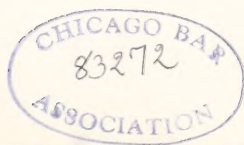


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191 I.A. 1

CHARLES H. MASON,
Defendant in Error,
vs.
ERIK L. KRAG and A. L. THOMPSON,
Plaintiffs in Error.)

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment in favor of Charles H. Mason, defendant in error, in the sum of \$112.25 in a suit on a promissory note for \$200, dated October 1, 1910, payable to order of defendant in error August 17, 1910, with 6% interest after maturity, and signed by plaintiffs in error.

A jury was waived and defendant in error introduced the note in evidence showing endorsements of the following payments: November 2, 1910, \$50, March 1, 1911, \$25, November, 1911, \$5.75. He testified that in addition to said payments there was paid on said note in the fall of 1911, the further sum of \$4.50, and that \$85.25 was absolutely all that had been paid thereon, and that there was due on the note \$132.25.

Mr. Krag testified that he made said first two payments amounting to \$75.00, and that after the note was given he, as agent of Mr. Thompson, contracted to give defendant in error desk room for three months in Mr. Thompson's office for which defendant in error agreed to pay \$15 per month, and that he, Krag, had an interest in the rent and "was supposed to get one-half of it". Defendant in error positively denied in toto the making of any such contract for rent or desk room.

Mr. Thompson testified that he made the other payments on said note shown by said endorsements and not paid

by Krag, and in addition thereto that he paid two other payments, one of \$12.00 and the other of \$25.00. He also testified that Krag stated to him that defendant in error wanted desk room in his office and would pay "about \$15.00 per month", and that he consented to that and Krag was supposed to have a half interest in the rent on account of certain things he did for Thompson. He also testified that defendant in error never asked him for desk room, and that he had no conversation at any time with him about it, and never asked him to pay the rent.

No propositions of law were submitted and the finding of the court on the issues of fact are binding upon us just in the same manner as would the same finding by a jury have been, as the finding is not manifestly against the weight of the evidence. Adams v. Squires, 96 Ill. App., 458; Donelson v. East St. L. Ry. Co., 235 Ill., 625.

It is further insisted by plaintiffs in error that the court erred in allowing the plaintiff interest, because, as they say, the evidence shows it to be usurious interest. The defense of usury is not in the case, because no plea of usury was filed, and no notice or claim of such a defense below is in any way shown by the record. The defense of usury can not be made under our statute, unless it is insisted on by a plea or a notice in writing stating that such a defense will be made. Section 74, Hurd's Rev. Stat. of Ill., 1911.

The judgment of the court is affirmed.

JUDGMENT AFFIRMED.

B. A. THORPE,
Defendant in Error,
vs.
MAX WEBER and DAVID B. WEBER,
Co-partners, doing business as
WEBER BROTHERS,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

191 I.A. 2

MR. JUSTICE HUNGAN DELIVERED THE OPINION OF THE COURT.

B. A. Thorpe's judgment of \$408 against Max and David B. Weber, plaintiffs in error, was rendered in his suit for \$408 commissions in securing Stanley Field as their tenant for the Columbus Hotel, 1840 South Wabash avenue, Chicago, for a period of ten years from June 1, 1910, to May 31, 1920, at an annual rental of \$1,200, being 2% of the first year's rental and 1% of the last eight years' rentals. His statement of claim also included \$100 for his commission on a sale of \$1,000 worth of furniture, but the evidence as to that item was excluded from the jury on motion of plaintiffs in error, because defendant in error was licensed only as a real estate broker.

Plaintiffs in error ask a reversal of the judgment, (1) because the contract for commissions was made by plaintiffs in error and one Mr. Deffler, an unlicensed broker, on his own behalf, or with him as the agent of defendant in error, and that Mr. Deffler made the entire negotiations with the tenant, Stanley Field, and that the contract was against the provisions of the city ordinances and void; (2) that plaintiffs claim is based upon a quantum meruit and that there is no evidence to sustain such a claim; (3) that the evidence showed a contract with Deffler that the commission for obtaining the tenant should be for the exact sum of \$300.



Figure 1. A diagram illustrating the structure of the system.

The diagram illustrates the structure of the system. It shows a central node connected to several other nodes, forming a network. The nodes are labeled with various identifiers, and the connections are represented by lines. The overall structure suggests a hierarchical or interconnected system, possibly representing a data network or a organizational chart. The labels include various alphanumeric codes and names, which are difficult to decipher due to the low resolution of the image.

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The evidence in the record is conflicting in several particulars; but the jury found against the plaintiffs in error in all their contentions before it, and we can not say their verdict is manifestly against the weight of the evidence. It must, therefore, be sustained by this court, unless prejudicial error is shown against plaintiffs in error. Honolulan v. E. St. L. Ry. Co., 235 Ill., 323.

About April 12, 1912, defendant in error received a circular signed, "Haber Bros., 1204 State St.", and plaintiffs in error admit that they mailed out a lot of just such circulars through their employees, but do not know whether or not one was sent to defendant in error. The circular contained these words:

"For rent, the following:
* * * * * Columbus Hotel, 1204 Tenth Ave.
60 Room Steam Heat, \$4000 per annum.
Will pay real estate board commissions
for good tenants."

Thompson, Plaintiff
On April 13, 1912, defendant in error answered the circular by letter to *defendants* plaintiffs in error saying, in substance, that Mr. Baffler of *plaintiffs* (defendant in error's) office had interested Messrs. Schultz and Field, of the Inter-Ocean Hotel, and that they had made a substantial offer for a lease on the property, and asked *defendants* (plaintiffs in error) to kindly protect him with reference to the regular real estate board rate of commission and he would give the prospective lessees proper attention. *Plaintiffs*
Defendant in error then sent Baffler to *defendants* plaintiffs in error to confer with them and they accepted his services, and by his efforts the lease in question was consummated and signed by Field, one of the parties mentioned in defendant in error's letter of April 13, 1912. The tenant was amply satisfactory to plaintiffs in error, but they testified that they asked Baffler what would be the commission, and that he answered \$200, and that they agreed to lease only on condition that

they only pay \$200 commission. Their evidence was, also, that they did not know he was the agent of defendant in error, and thought he was acting in his own behalf. Beffler testified that he told them that the commission would be the regular real estate board commission which would be thirteen per cent of the first year's rental, and that he thought it would amount to about \$200. He further testified that he told plaintiffs in error that they would have to see defendant in error, if they got any cut on the commission, as he had nothing to do with that. It also clearly appears in evidence that Beffler was merely an employee of defendant in error, and working under defendant in error's instructions in this deal, and that he did all the negotiations afield for defendant in error in securing the lease in question. He was to be paid \$12.50 per week as such employee and in case the lease in question was secured, one-half of the commission, and defendant in error was to receive the other half.

The proof also showed that for a ten year lease the real estate board commission promised in plaintiffs in error's circular was 13% of the first year's rental, or 5% of the first year's rental and 1% of the last eight years' rental combined, and that Beffler had no authority to change this rate with plaintiffs in error. The letter of April 12, 1912, clearly apprised plaintiffs in error that they were dealing with defendant in error through Beffler, who also testified he so informed them in express words.

Thorpe was duly licensed as a real estate broker by the City of Chicago, as provided by its ordinances. Beffler was not so licensed. The city ordinances of Chicago further provide, as follows:

"Any person employed by a person or corporation licensed as a broker under the provisions of this chapter who shall himself engage in the business or act in the capacity of a broker, shall notwithstanding the fact of such employment be

amenable to all the provisions of this chapter and will be required to take out a broker's license."

The ordinances also provide a penalty for the violation of said ordinance. It is clear by the reading of the foregoing ordinance that employees of a broker are not required to take out a broker's license unless they themselves engage in the business or act in the capacity of a broker on their own account and aside from their work as employees of brokers. So long as they are merely employees of brokers, they are not brokers and the fact merely that they are paid for their work a certain portion or per cent of the commission does not establish that they are brokers within the meaning of that ordinance.

There is no merit in the contention that the defendant in error's claim is based upon a quantum meruit count. The statement of claim, as above set forth, simply discloses that defendant in error is suing for the "real estate board commissions", premised in the circular letter aforesaid, and specified his claim further by stating the rental named in the lease and that his claim is 8% of the first year's rental and 1% of the last eight years' rentals, without stating whether he relies on that sum of \$463 as the contract price, or as the usual, customary and reasonable charge for his work. It was proved to be the contract price, or at least the jury were warranted in so finding.

The court erred in not permitting plaintiffs in error's counsel to cross examine some of the witnesses for defendant in error, perhaps on the theory that they were called for cross examination by him under section 33 of the Municipal Court Act. No such notice was given by him before the examination, and no such claim should be allowed, unless due notice thereof is given before the witnesses testify.

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The error was evidently harmless, however, as the witnesses were thoroughly examined afterwards by plaintiffs in error in regard to all matters inquired of them by defendant in error.

There is no merit in the other contentions of plaintiffs in error that the court admitted improper evidence. Finding no reversible errors in the record, the judgment is affirmed.

AFFIRMED.

THE STANDARD BREWERY, a corporation,
 Plaintiff in Error,

vs.

CHARLES A. JOHNSON,
 Defendant in Error.

Defendant in Error.

MUNICIPAL COURT
 OF CHICAGO.

191 I.A. 5

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error began suit in the Municipal Court to recover from defendant in error \$1,000, which it claims to be entitled to as agreed and liquidated damages, because of the breach by defendant in error of the following contract:

"This agreement, witnesseth, that in consideration of the sum of \$500 in hand to him paid by the Standard Brewery, a corporation of Illinois, and the loaning to him by said Standard Brewery of a complete set of saloon fixtures, Charles A. Johnson, hereinafter designated as the vendee, hereby agrees to purchase from the Standard Brewery, a corporation of the State of Illinois, its successors and assigns, hereinafter called the vendor, and from no other person, firm or corporation, all the domestic beer sold by him or his agents or servants, at or about his saloon located at 2827 North Clark street, Chicago, Illinois, for cash on delivery at the rate of the usual market price of the Standard Brewery for beer, at the time of delivery, from the first day of November, 1907, to the 31st day of October, 1912, and that he will not sell or lease his said saloon to any person or persons who do not make an agreement similar to this with said vendor.

"In case said vendee, his heirs, successors or assigns shall fail or neglect to purchase all the domestic draft beer required by him or them, at said premises from the vendor, during the term above specified, or in case of any breach of this agreement on his part, then the said vendee or his heirs shall pay the said vendor \$1,000. If said vendee, his heirs, successors or assigns have domestic beer of other manufacture than that of the vendor's upon said premises it shall be taken and deemed to be conclusive evidence of a violation of this covenant and entitle said vendor to damages as herein specified.

"It is further agreed that said brewery will furnish said Johnson for his use during above said term a city saloon license, which said Johnson will from term to term assign to above said brewery, and return it to said brewery at the end of said five years.

"And by its acceptance hereof said vendor hereby agrees to sell to said vendee or his assignee all of the domestic beer of the manufacture of said vendor required by him in his saloon upon said premises, upon the above terms and conditions.

"(Signed) CHARLES A JOHNSON. (CHAL).
Accepted: THE STANDARD BREWERY,
(Signed) By August J. Jones,
Vice-President."

It is not denied that defendant in error, after having for four years and a half faithfully performed all the covenants in the contract to be kept by him and when the contract had but six months more to run, violated the terms of the agreement by selling or renting his saloon to a person who did not enter into a contract with plaintiff in error of like import to the one sued on, and who did not buy all the domestic draft beer used in his business of plaintiff in error. On the trial plaintiff in error introduced the contract sued on, in evidence, and offered to prove facts from which the amount of the prospective profits of plaintiff in error for the six months during which defendant in error did not purchase from it all the domestic draft beer used in the saloon in question, if the contract had been performed, could be estimated. This proof was objected to by defendant in error and properly excluded by the court for the reason that plaintiff in error had limited itself in its affidavit of claim to a recovery on the basis of liquidated damages. If the suit had been brought to recover actual damages, the proof offered would have been competent. At the end of the case made by the plaintiff, the court instructed the jury to find the issue for the defendant. On the verdict returned in pursuance to that instruction, judgment was entered against plaintiff in error in bar of its action and for costs. ~~The judgment is hereby affirmed with costs.~~

In the view we take of this case but one question need be discussed in this opinion, namely, does the damage clause in the contract sued on provide for liquidated damages or a penalty? The contract does not in terms designate the damages as either liquidated or otherwise, but a specific

amount is named therein as such. When a specific amount is named in a contract as damages to be paid in case of a breach, it is a circumstance tending to show the intention to constitute that amount liquidated damages, provided the amount so named is based upon and substantially limited by just compensation. Unless it is so based and limited and particularly when the amount so named is so grossly disproportionate to the amount of damages that could result from the breach, whenever it might occur, as to be oppressive, unconscionable and extortionate, courts do not hesitate to declare the intention of the parties to have been to provide a penalty, even when the term "liquidated damages" is used in the contract. That construction of all contracts is favored by the courts, in the redress of civil injuries, that results in just compensation, rather than forfeitures. It is conceivable that contracts may be made which, if broken by a party at one time, would result in the same amount of damages to the other party, as if broken at any other time, but the contract before us is not one of that kind. It was to run for five years. The benefit to be derived by plaintiff in error from the faithful performance of the contract by defendant in error was the profits to be derived from the sale of its domestic draft beer for five years. The loss it would sustain in consequence of its breach would be the profits it would have made on such beer for the unexpired part of the five years after the breach. With every day the contract was performed the amount of the possible damages to result from its breach was reduced proportionately. Assuming, if we may by way of illustration, that under this contract \$1,000 would have been a just and adequate compensation for all damages plaintiff in error would have sustained, if defendant in error had never performed his contract for a single day, it follows that his failure to perform it for one

tenth of the time only, which is all that is claimed, could result in but one-tenth as much damage or one hundred dollars. To exact of him One Thousand dollars for a breach of a contract that damaged plaintiff in error but one hundred dollars would, therefore, plainly be oppressive, unconscionable, unjust and extortionate, and entirely out of joint with any idea of just compensation. We, therefore, conclude that when the parties entered into the contract sued on, they did not intend to agree to \$1,000 as liquidated damages, but did intend to establish a penalty which should insure to plaintiff in error just compensation for all damages it should suffer by reason of any breach of the contract. The best discussion of the question of the construction of contracts of this character of which we are aware is found in County of Maricopa v. State Bros. Bridge Co., 116 Ill. App., 383. We fully agree in what is said by Mr. Justice Farmer in that opinion.

Plaintiff in error, relying solely on a right to recover the \$1,000 as liquidated damages, the Municipal Court could not properly have done otherwise than to give the peremptory instruction complained of.

The judgment of the Municipal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

19246
848 - 19246.

CHICAGO FORM COMPANY, a corporation,
and M. H. CASIER,

Appellees,

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

vs.
GEORGE S. GREENBURG and HENRY
BUCKGELSCH, *Greenburg and
Buckgelsch*
Appellants.

191 I.A. 4

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellee, the Chicago Form Company, is a corporation of which the other appellee, M. H. Casier, is the president. Appellant, George S. Greenburg, and one Henry Buckgelsch, on November 1, 1906, were about to form a corporation to be known as the Green-Buck Co. for the manufacture of some metal specialties. Being desirous of securing the room described in the lease hereinafter mentioned, to be occupied by the Green-Buck Company when it should become incorporated, they induced M. H. Casier, who is a lawyer, to secure a lease thereof for them. The lease was to be taken in the name of the Chicago Form Co. and M. H. Casier, as lessees.

Casier secured from one *Warren* Springer the lease desired for a term beginning December 1, 1906, and ending April 30, 1912, at a monthly rental of \$175, and paid the first month's rent therefor. On December 18, 1906, the following agreement in writing was executed:

"THIS AGREEMENT between the Chicago Form Company, and M. H. Casier of Chicago, Illinois, parties of the first part, and George S. Greenburg and Henry Buckgelsch of Chicago, Illinois, parties of the second part.

"WITNESSETH, that whereas the party of the first part has leased for a period beginning December 1, 1906, and ending April 30, 1912, from Warren Springer, certain tenement known as the fifth floor of No. 300 South Clinton Street.

"It is agreed between the parties hereto that the said premises shall be used and occupied, during the term aforesaid, or until otherwise contracted for by the parties hereto, and all rents and charges claimed by the owner or landlord, shall be met and satisfied by the parties of the second part, and they do hereby agree to protect and save the said party of the first part from all liability arising out of said lease. This in consideration of their use and occupancy of the premises.

CHICAGO FURN COMPANY,
H. M. CASIER,
GEO. C. GREENBURG,
HENRY RUCKGEISEL."

It ^{seems} to be conceded that Greenburg and Ruckgeisel occupied the premises until the Green-Duck Company was incorporated which was in the early part of January, 1907; that the first months rent was repaid to Casier by Greenburg and Ruckgeisel, and that after the Green-Duck Company was incorporated it occupied the premises until about January 31, 1910, and paid all the rent directly to Warren Springer, the landlord. Under what arrangement this course on the part of the corporation was pursued the record does not disclose. For some reason also not disclosed by the record the premises in question were not occupied by either the Green-Duck Company or Greenburg or Ruckgeisel after about February 1, 1910, and neither did they or either of them after that date pay the rent stipulated for by the terms of the lease. The lease contains a power of attorney from the lessees to confess judgment against them in favor of the landlord for the amount of any rent not paid when due and costs, together with one hundred dollars attorney fees.

On April 24, 1911, by virtue of the power of attorney contained in the lease a judgment was confessed in the Municipal Court in favor of Springer, the landlord, and against ^{plaintiffs} ~~appellees~~ for \$2000 and costs, which was for eleven months' rent at \$175 per month, amounting to \$1875 and \$100 attorney fees. The costs in that case were \$12, making the total amount of the judgment and costs, \$2000. Of this judgment

appellant had notice, but there is nothing in the record to show that he ever took any steps either to have it vacated or to pay it or to prevent ^{appellees} appellees from being forced to pay it. A motion by appellees to vacate it made in apt time was on October 28, 1911, denied and the judgment was confirmed. This judgment was satisfied December 19, 1911, and appellees claim it was paid in full by them. Thereafter this suit was instituted by appellees against George C. Greenburg and Harry Buckgeischel to recover the amount so paid. Appellees in their affidavit of claim relied on the contract of December 18, 1906, heretofore set out and also on a claimed contract of January 8, 1907. The execution of the contract of January 8, 1907, was denied by appellant both in his affidavit of defence and on the witness stand. He also introduced in evidence a special finding by a jury in another case as tending to prove that it had not been executed. The court thereupon excluded from the consideration of the jury all evidence as to its execution. The jury found the issues against the defendants and assessed the plaintiff's damages at \$3028. From a judgment on this verdict defendant, George C. Greenburg, alone appeals.

The evidence as to the contract of January 8, 1907, being excluded from the consideration of the jury that contract can not be considered by this court in determining the correctness of the verdict returned or of the judgment thereon.

The contract of December 18, 1906, obligated Greenburg and Buckgeischel as individuals to "protect and save the said party of the first part, (The Chicago Farm Company and E. H. Gazier, appellees here) from all liability arising out of said lease", until "otherwise contracted for by the parties." The lease by its terms made appellees liable for the stipulated rent of \$175 per month from December 1, 1906, to April 30, 1912, and for \$100 attorney fees in case a judgment by

confession was entered against them for rent in arrears under the power of attorney for that purpose contained in the lease.

If appellees paid the Springer judgment in full as claimed by them, they were damaged to the extent of \$3000 by reason of the failure of Greenburg and Buckgeischel to "protect and save" them from all liability under the lease in question, and the verdict and judgment in this case are right on the merits.

The fact that appellees relied in their affidavit of claim on two different contracts, one as an original undertaking on the part of appellant and Buckgeischel, and the other as guarantors of the obligation of a corporation, is no reason why they may not recover on the original undertaking when the same and its breach is established by the evidence and the evidence of the contract of guaranty is excluded from the record at the instance of appellant.

On the question whether appellees paid that judgment in full the evidence was somewhat conflicting. The jury heard the evidence and found that it was paid in full by them, and we think the evidence fairly tends to support that finding, at least it is not so manifestly against the weight of the evidence as to warrant us in setting the judgment aside for that reason.

The contention of appellant that the contract of December 16, 1906, had been superseded by and merged in the contract of January 8, 1907, and that its introduction in evidence was error because of the familiar rule that when prior negotiations or contracts are subsequently merged in a written contract, proof of the prior negotiations or contract is inadmissible, has no merit for the reason that no such subsequent contract is shown by the record to have been entered into. If the contract appellees claimed was entered into on January 8, 1907, had been established and admitted

in evidence there might then have been some force in the contention.

Appellant also insists that oral proof of matters antecedent to the contract of December 18, 1906, and merged therein was improperly admitted. The proof referred to in that connection related solely to the circumstances under which the lease from Springer to appellees was made and did not refer in any way to the facts covered by the contract of December 18, 1906, and was properly admitted.

It is next argued by appellant that the contract of December 18, 1906, was intended by the parties to be a temporary arrangement, and to be binding only "until otherwise contracted for by the parties", as therein expressed. While this argument is sound enough if it fitted the facts, the record fails to show that the parties ever "otherwise contracted".

It is undoubtedly true, as contended for by appellant, that the contract of December 18, 1906, was intended by the parties to be in a sense a temporary arrangement, but it is clear that they intended it to continue in force until the end of the period for which the premises in question were leased, unless they sooner abrogated it by another contract. Whatever may have been shown if the claimed contract of January 8, 1907, had been established, the record before us contains no proof that any subsequent contract was made by the parties in relation to the subject matter covered by the contract of December 18, 1906. We must, therefore, hold that contract to be in force while the rent was accruing for which judgment was confessed against appellees.

It is next urged that in any event the measure of appellee's damage was the rent paid and not the amount of the judgment. In other words, that the attorney fees and costs included in the judgment confessed were not covered by

the contract sued on. That contract provided that appellant and Duckgsischel would protect and save the said party of the first part from all liability arising out of said lease. The attorney fees and costs included in the judgment confessed were as much a part of appellees' liability under the lease as was the rent and were covered by the contract sued on.

Other complaints are made of the rulings of the court on the admission of evidence and as to the instructions given to the jury, but such rulings and instructions were all in accord with the views here expressed and were correct.

Finding no error in the record the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

19379
355 - 19379.

JOHN J. SHEA,
Appellee,

vs.

PAUL J. MORANE,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

191 I.A. 11

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellant procured the arrest of appellee on the charge of embezzlement. On the hearing of the charge before a justice of the peace appellee was discharged. He then sued appellant for malicious prosecution and obtained a judgment against him for \$500. This is an appeal from that judgment.

The charge of embezzlement was based on the claim that appellee, while the agent of appellant, had collected money belonging to appellant and had appropriated the same to his own use.

The undisputed facts disclosed by the evidence are that before the complaint was made on which the warrant for the arrest of appellee was issued, appellant went to his regular attorney who for years had transacted for him such business as required the services of an attorney and fairly and fully submitted to him all the facts within his knowledge concerning the charge that was eventually lodged against appellee. On the following day the attorney went to the office of appellant and examined the books of appellant pertaining to the matter and talked with the book-keeper and the cashier and again talked with appellant, going over the facts with each separately. The attorney then advised that a demand be made on appellee for the money, which was done with the result that appellee refused to turn it over. The attorney then advised appellant that appellee was guilty of

the crime of abettement and advised him to "swear out a warrant". Acting on this advice the complaint on which the warrant in question was issued was made. There is no suggestion in this record that the attorney on whose advice appellant acted is not an entirely reputable and competent attorney. In our judgment the course pursued by appellee, as shown by the uncontradicted evidence, successfully rebutted any presumption of malice that might otherwise have obtained, and conclusively established the fact that appellant did not act without probable cause.

In Levinson v. Thomas, 174 Ill. App., 68, we said:

"In order to maintain a suit for malicious prosecution the plaintiff must aver and prove, among other things, that the defendant, in procuring the arrest of the plaintiff, acted maliciously and without probable cause for believing the defendant to be guilty of the crime charged."

"It is the well established law in this State that where a prosecuting witness presents all the facts within his knowledge, or that he could have ascertained by reasonable diligence, fairly and without reserve to a state's attorney, or some other lawyer of recognized ability and good standing, and in good faith acts on his advice, he cannot be held responsible in an action for malicious prosecution. Amerson v. Friend, 71 Ill., 475; Hauptfeld v. Holminski, 144 Ill., 83; Ellis v. Thomas, 41 Ill., 470; Ray v. Spina, 112 Ill., 405. If that course is pursued, it is held to negative the want of probable cause and to rebut the presumption of malice, even though such counsel gives him bad advice and even if the facts made the basis of the charge do not constitute the crime charged."

The judgment of the Circuit Court is, therefore, reversed with a finding of facts to be incorporated in the record.

JUDGMENT REVERSED
WITH FINDING OF FACTS.

FINDING OF FACTS:

We find as ultimate facts that in causing the arrest of appellee appellant did not act maliciously or without probable cause.

WESTERN COAL & MINING COMPANY,
A Corporation,
Defendant in Error,

vs.

NORTHERN COAL & SUPPLY COMPANY,
A Corporation,
Plaintiff in Error.

ERRON TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 13

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

The Western Coal & Mining Company, hereinafter referred to as the plaintiff, brought suit against the Northern Coal & Supply Company, hereinafter referred to as the defendant, for \$100.00 alleged to be due "upon an open account" for coal sold and delivered on diverse dates between February 2, 1912, and March 3, 1912. The defendant filed a set-off, claiming damages to the amount of \$504.00 for an alleged breach of the contract under which such coal was furnished. Upon a trial before the court without a jury, a judgment for the plaintiff was entered, whereupon the defendant sued out this writ of error. Both the parties ^{were} engaged in the business of mining and selling coal. The plaintiff's office is at St. Louis, and the defendant's at Chicago. On January 9, 1912, the defendant gave a written order to the plaintiff for twenty-five cars of washed coal at the price of forty cents per net ton f.o.b. at the mines, to be shipped at the rate of three cars a day. The plaintiff accepted the order with the qualification that it would ship only one car a day. To this qualification the defendant agreed, in a letter dated January 17, 1912, in which defendant urged greater speed if possible and indicated that it expected deliveries to begin at once. No deliveries were made, however, until February, and only eleven cars in all were delivered. Between the date of the order and March 13, 1912, a number of letters were written by defendant to the plaintiff complaining of the delay and urging its need of more coal, to which the plaintiff replied by claiming ^{that} cold weather and a scarcity of cars had prevented it from shipping

any faster. On March 13, 1912, defendant telegraphed: "have sold coal and must deliver. Are you going to fill order?" To this, the plaintiff replied by mail that it would not be able to make any further shipments, for the reason that its "entire output will go out, from the present time on, as mine run for railroad use." In this letter the plaintiff also expressed the hope that the defendant was "protected on the sale of this coal by delays in transportation, scarcity of cars, and other causes over which you have no control, which is the occasion for our failure to complete this order as placed." On March 26, 1912, defendant wrote to the plaintiff, stating that it had sold the "14 cars due us on this order" at an advanced price of \$1448, that "our customers were compelled to go on the market and buy coal and we will suffer heavy damages, and we will be compelled to pass the same along to you," adding further: "We regret, therefore, to be compelled to advise you that we will hold your account to reimburse us against any loss for non-fulfillment of this order." At the time this letter was written nothing had been paid for the coal that was delivered, nor had any demand been made upon the defendant for such payment. There is nothing in the order as given, nor its acceptance, nor in any of the letters that passed between the parties as to the time or manner in which payment should be made for the coal, unless a printed clause found upon the letter-heads used by defendant may be so considered. That clause reads: "Accounts due on 10th of month following shipment." As defendant was in the business of selling coal, it is evident, we think, that this clause refers to "accounts due" to defendant, and not to its accounts payable, and therefore has no reference to the contract with the plaintiff. The defendant offered, but was not permitted, to prove that there was a general custom among dealers in coal to pay for their coal at any time during the month following shipment, in the absence of any agreement to the contrary. Proof of such a custom was competent, under the facts of this case, to show that defendant was not in default at the time the

plaintiff refused to complete its contract, and it was error for the court to exclude it.

The main controversy, however, arises upon the ruling of the trial court with reference to the defendant's claim of set-off. The defendant sought, but was not allowed, to prove that the difference between the contract price of the coal ordered and the fair cash market value of the same during the month of March, 1912, was more than five hundred dollars. The court sustained an objection to a question of that character, properly framed, and also sustained an objection to an offer to prove, by a witness then on the stand, that such was the fact.

The theory upon which these objections were sustained seems to have been that the defendant was in no position to claim damages from the plaintiff for any breach of the contract by the latter because the defendant was itself in default in not having paid, or offered to pay, for the eleven cars of coal it had received and used. This theory is again advanced in this court, and the case of Harber Brothers Co. v. Moffat Cycle Co., 181 Ill. 34, is relied on by plaintiff's counsel. In that case, a contract was made by which the Cycle Company agreed to deliver to the Harber Brothers Company, one of the selling agents of the Cycle Company, three hundred safety bicycles, shipments to begin at a certain time and to continue thereafter at such times and in such quantities as the Harber Brothers Company should specify, and to be paid for, as delivered, by giving its acceptances at thirty days. Several shipments were made as ordered from time to time, but the Harber Company neglected to pay for the same or give its acceptances, as agreed. After repeated demands for payment, the Cycle Company refused to make further shipments until the goods shipped were paid for and notified the Harber Company that unless such payment were made within five days it would terminate the selling agency of that company. The Harber Company refused to pay and brought suit for breach of contract. The court held that under such circumstances, the suit could not be maintained for the reason that

"neither party can, by any means, obtain the aid of a court to enforce in his favor a contract which, without legal excuse, he has substantially failed to perform on his part." The facts in that case, however, are clearly distinguishable from the facts in this case. There is nothing in the evidence in this case tending to prove that the defendant, "without legal excuse," had "substantially failed to perform" its part of the contract. Here, the whole quantity ordered was to be delivered in twenty-five days. The parties evidently treated the contract as an entirety, and acted upon the understanding that nothing was due from the defendant until the whole quantity ordered had been delivered. In none of the subsequent correspondence, in which the defendant was constantly urging the plaintiff to perform its part of the contract, and the defendant was making excuses for its failure to perform, is there any hint that anything was due from the defendant--not even in the letter in which the plaintiff "regretted that it would not be able" to complete the contract. The Farber Brothers case, supra, does not hold that under such circumstances, a buyer must prove that he paid or offered to pay for the goods actually received by him before he could maintain an action for damages against the seller. On the contrary, that case recognizes the right of the buyer under such circumstances, where he is not otherwise in default and where the damages caused by non-delivery of the remainder equal or exceed the amount due from the buyer, to offer to recoup or set-off the amount due against such damages, and to release the damages to that extent. The court said, in effect, that such an offer, if made, would be "equivalent to performance" on the part of the buyer, or at least would have been a legal excuse for non-payment. As regards the letter of March 23, 1913, in this case, as amounting to such an offer. The right to recoup or set-off such damages in a suit for the value of the goods delivered, where the buyer is not in default, is recognized in Bradley v. King, 44 Ill. 339; Richards v. Shaw, 87 Ill. 232; Helmes v. Stumzel, 24 Ill. 370;

Queen v. Deolan, 35 Ill. 326; Wime v. Klasey, 9 Ill. App. 100; and Roberts-Manchester Publishing Co. v. Wice, 140 Ill. App. 443.

In the case last cited, a contention very similar to that of the counsel for the plaintiff in this case was made, and the court held against the contention in the following language: "The ruling of the trial court that defendant was bound to pay for all the volumes received and retained by him from plaintiff at the contract price meets with our sanction; but with the contention of counsel for plaintiff that defendant, because of his failure to make such payments, was precluded from recouping or setting off his damages against plaintiff's claim, we cannot agree. * * * The written contract of the parties must be construed in the light of the subsequent actions. While defendant was not relieved from the obligation of his contract to pay for the volumes retained by him at the stipulated price, he was not cut off by reason of his default in this regard from setting off or recouping his damages, suffered through plaintiff's breach, a claim which plaintiff clearly recognized, although the measure of damages was not agreed upon." This language, we think, is peculiarly appropriate to the facts of this case.

We are of the opinion that the court erred in refusing to permit the defendant to make the defense set up by its claim of set-off, and for the reasons above stated, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

The first part of the report, which deals with the general situation of the country, is divided into two sections. The first section, which is the most important, deals with the political situation. It begins with a description of the political system, which is based on a constitution that was adopted in 1947. The constitution provides for a democratic form of government, with a president elected by the people for a five-year term. The president is the head of state and has the power to appoint and dismiss the prime minister and the members of the cabinet. The cabinet is responsible to the parliament, which is composed of two houses: the National Assembly and the Senate. The National Assembly is elected by the people, while the Senate is elected by the provincial legislatures. The report then goes on to describe the political parties and the results of the elections. It notes that the main parties are the Congress Party, the Muslim League, and the Indian National Congress. The Congress Party is the largest and most influential party, and it has won the majority of the seats in the National Assembly. The Muslim League is the second largest party, and it has won a significant number of seats in the Senate. The Indian National Congress is the third largest party, and it has won a smaller number of seats in both houses. The report then discusses the political situation in the provinces. It notes that the provinces are generally stable, but there are some problems in the north and west. In the north, there are problems with the government of the Punjab, which is a province with a large Muslim population. In the west, there are problems with the government of the Sindh, which is a province with a large Hindu population. The report then discusses the political situation in the princely states. It notes that the princely states are generally stable, but there are some problems in the north and west. In the north, there are problems with the government of the Jammu and Kashmir, which is a princely state with a large Muslim population. In the west, there are problems with the government of the Hyderabad, which is a princely state with a large Hindu population. The report then discusses the political situation in the tribal areas. It notes that the tribal areas are generally stable, but there are some problems in the north and west. In the north, there are problems with the government of the North-West Frontier Province, which is a tribal area with a large Muslim population. In the west, there are problems with the government of the Baluchistan, which is a tribal area with a large Hindu population. The report then discusses the political situation in the union territories. It notes that the union territories are generally stable, but there are some problems in the north and west. In the north, there are problems with the government of the Chandigarh, which is a union territory with a large Muslim population. In the west, there are problems with the government of the Delhi, which is a union territory with a large Hindu population. The report then discusses the political situation in the foreign territories. It notes that the foreign territories are generally stable, but there are some problems in the north and west. In the north, there are problems with the government of the Tibet, which is a foreign territory with a large Muslim population. In the west, there are problems with the government of the Nepal, which is a foreign territory with a large Hindu population. The report then discusses the political situation in the international relations. It notes that the country has a good relationship with the United States, and it is a member of the United Nations. It also has a good relationship with the Soviet Union, and it is a member of the Council of the Mutual Assistance. The report then discusses the political situation in the future. It notes that the country is expected to continue to develop, and it is expected to become a major power in the world. The report then discusses the political situation in the conclusion. It notes that the country is a democratic country, and it is a member of the United Nations. It also has a good relationship with the Soviet Union, and it is a member of the Council of the Mutual Assistance. The report then discusses the political situation in the appendix. It notes that the appendix contains a list of the members of the cabinet, and it contains a list of the members of the parliament. The report then discusses the political situation in the index. 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It notes that the endnotes contain a list of the footnotes that are used in the report.

E. W. SHINE,
Plaintiff in Error,

vs.

BIKE BROTHERS BREWING COMPANY,
a Corporation,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 15

MR. PRESIDING JUDGE FITCH

DELIVERED THE OPINION OF THE COURT.

This was an action of the fourth class in the Municipal Court, brought to recover \$357.50, alleged to be due to the plaintiff by the terms of an alleged written lease, for rent for the month of May, 1912, of certain premises in Chicago. Upon a trial before the court without a jury, a finding and judgment were entered in favor of the plaintiff for \$27.50. The plaintiff sued out this writ of error.

The plaintiff's statement of claim avers that on March 28, 1912, the plaintiff "executed and delivered" to defendant, a written lease of the premises in question, for a term beginning May 1, 1912, and ending April 30, 1913, at a rental of \$357.50 per month, payable in advance; that defendant "accepted the said lease" and took possession of the premises "thereunder," but did not pay the rent for May, 1912, when it became due under the terms of the lease.

The defendant's amended affidavit of merits states that defendant has a good defense, upon the merits, to all except \$27.50 of the plaintiff's demand. It denies, however, that defendant either "accepted the lease mentioned in the statement of claim," or went into possession under it, and then avers, in substance, that prior to April 30, 1912, the defendant was in possession of the premises under a lease providing for a monthly rental of \$330, that a fire occurred there in January, 1912, that soon

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after, a verbal agreement was made, to the effect that "in consideration of the defendant's renting the said premises at an increased monthly rental, to-wit: \$357.50, the defendant would be allowed the sum of \$330 by the plaintiff to compensate the defendant for the damages suffered through the aforesaid fire;" that "defendant has tendered \$27.50, being the difference between the monthly rental due on the first day of May, 1912, and the said \$330;" and that said tender was refused by the plaintiff.

There is no controversy as to the facts. All the evidence that was admitted was received without objection. It appears from the evidence that for several years prior to April 30, 1912, defendant had occupied the plaintiff's premises under written leases from year to year, and was paying rent at the rate of \$330 a month. These leases were negotiated on the part of the plaintiff by his agent, W. B. Cowan. In January, 1912, a fire occurred in one of the leased buildings, and caused damage to the defendant's property. In February, or early in March, 1912, William A. Birk, the president of the defendant company, had several conversations with Cowan regarding a new lease for the year beginning May 1, 1912. In the course of these conversations, Birk asked for "a concession for the fire loss." The negotiations between them resulted in an oral agreement, or understanding, to the effect, as stated by Birk, that defendant "would get a new lease from May 1, 1912, to April 30, 1913, by paying an additional rental of \$27.50, and he (plaintiff) would refund us \$330 toward our fire loss." Thereupon the plaintiff prepared and signed, in duplicate, a written lease of the premises, and sent the same to the defendant to be executed by it. This lease was dated March 28, 1912, and demised the premises to defendant for one year from May 1, 1912, at a term rental of \$4,290, payable in twelve monthly installments of \$357.50 each, in advance, but made no mention whatever of any deduction or allowance for the

defendant's fire loss. Defendant objected to the lease for that reason, whereupon Cowan, while admitting he had agreed to make such an allowance, said that "Mr. Shirk didn't seem to like it very well," and that he (Cowan) "would have to see Mr. Shirk" about it. On April 27, 1912, nothing further having been heard from Cowan, Shirk signed one of the duplicate leases on behalf of defendant and sent it by a messenger to Cowan, with a letter enclosing a check for \$27.50. The letter stated that the check was "in full for May rent, deducting therefrom \$500 for fire loss," and requested Cowan to "give bearer receipt for May rent." Cowan declined to accept the check or give a receipt in full for the May rent, saying, in substance, that he would make the allowance on the last month's rent, but not on the May rent. The messenger took back the signed lease and check to Shirk, who thereupon scratched his signature from the lease and returned it to Cowan, with the message that defendant "did not want the premises." When this message was delivered, the messenger also said to Cowan that if he (Cowan) did not want the defendant to remain in the premises, "let us know right away" so that the sub-tenants could be notified to move. To this Cowan replied, "Leave your tenants where they are. I will take care of them." This was on April 28, 1912. For some reason not disclosed by the evidence, only one of the duplicate written leases was returned to the plaintiff. The other remained in defendant's possession, signed by the plaintiff, but not signed by the defendant. Without anything further being said, the defendant remained in possession of the premises during the month of May, 1912, and on May 29, 1912, this suit was brought to recover the May rent as specified in the written lease, upon the sole theory, as shown by the plaintiff's statement of claim, that the facts above stated amount to such an acceptance of the written lease as entitled the plaintiff to recover the full amount of the rent reserv-

ed according to its terms. It also appeared that at the time of the trial (in February, 1913) the defendant was still in possession and was then paying rent at the rate of \$357.50 per month.

We think the only reasonable conclusion that can be drawn from this uncontradicted evidence, when all the facts and circumstances are considered, is that the written lease, upon which this suit was brought, was never in fact accepted, or intended to be accepted, by the defendant, and that therefore the defendant did not occupy the premises "thereunder," as alleged in the plaintiff's statement of claim. The execution and delivery to the defendant of the written leases, containing no provision for the allowance that had been orally agreed on, was not an act done in the furtherance of the oral agreement of the parties, but amounted to the submission of a new offer or proposal on the part of the plaintiff to renew the defendant's lease for another year on terms that had never before been mentioned. This offer was expressly declined by the defendant, and one of the duplicate leases was returned to the plaintiff's agent in such a manner as to clearly advise him that the defendant would remove from the premises at the expiration of its existing lease, if the new proposition thus submitted was ~~xxx~~ insisted upon. The mere fact that only one of the duplicate leases was so returned is not, of itself, sufficient to show that this positive rejection of the plaintiff's new offer was not made in good faith and without reserve. The other duplicate was never signed by defendant, and although all doubt upon the question would have been removed by returning it at the same time as the other, yet we think the failure to do so, under the circumstances shown, is not sufficient to prove that defendant secretly intended to accept and abide by the terms of the written lease, while openly and avowedly professing to the contrary. In our opinion, the offer of the plaintiff, evidenced by the written leases submitted to defendant, ceased to have any force or effect whatever on April 22, 1912, when the offer was, in terms,

rejected. At that time, the defendant offered to surrender the premises and to notify its sub-tenants to remove, if the plaintiff did not want them to remain, but the plaintiff's agent told defendant to "leave the tenants alone."

The situation, then, during the month of May, was this: that defendant, by its tenants, was in possession of the plaintiff's premises, and was either holding over without any new agreement, or was holding under the alleged oral agreement, or some agreement other than the alleged written lease set forth in the plaintiff's statement of claim. This being true, it follows that the plaintiff could not recover in this action without amending his statement of claim. Having chosen to base his right to recover solely upon the alleged written contract, and having failed to make out his case, as alleged in his statement of claim, the finding and judgment of the trial court should have been for the defendant. Upon the issue presented by the statement of claim and the denial of the defendant contained in the affidavit of meritorious defense, the question whether the defendant was liable for use and occupation, or by reason of its holding over without any new agreement, or by reason of the alleged oral agreement, was wholly immaterial. The facts regarding such occupation and ~~and~~ the oral agreement with reference thereto were competent and proper to be considered only for the purpose of establishing or refuting the claim set forth in the plaintiff's statement of claim. "It is still the law in the Municipal court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement, and recover upon proof of another, without amendment. The issue is made by the statement of claim, and the evidence must be limited by that statement." (Walter Cabinet Co. v. Russell, 220 Ill. 418.) The plaintiff could not be required to amend his statement of claim, nor to accept a judgment based upon a claim he did not choose to assert.

The transcript of the record shows that at the close of all the evidence, the court said: "The evidence is all in favor of the defendant." Immediately after this statement, however, is the recital that "thereupon the court found the issues for the plaintiff, and assessed the plaintiff's damages at \$27.80." Now it was possible to "find the issues" for the plaintiff, and at the same time find that "the evidence is all in favor of the defendant," is a question which counsel for defendant attempted to answer by urging that the defendant's affidavit of defense is, in legal effect, a claim of recoupment. But a claim of recoupment admits the existence and validity of the contract upon which the suit is brought, while the defendant's whole defense is based upon the assertion that no such contract was ever in force. "In its modern application, the foundation of recoupment is failure of consideration. The defendant, in effect, admits his failure to perform the contract upon which he is sued, and seeks to extenuate his default by showing that the plaintiff has failed, in some particular, to do that which was the consideration of the defendant's promise, and to that extent, therefore, the plaintiff has no right to hold the defendant liable." (Deegan v. Timmre, 122 Ill. 280, 284.) Such is not at all the character of defense that is alleged in the affidavit of merits in this case. Here the affidavit denies that the alleged contract upon which the suit was brought was ever accepted or acted upon by the defendant, and then sets up another and wholly different contract which, it is stated, the defendant offered, and the plaintiff refused, to perform. A claim of recoupment must arise out of the contract upon which the suit is brought, or be connected, in some manner, directly therewith. Where a plaintiff fails to prove the contract sued on, the defendant cannot prove another and different contract and then recoup damages for its breach. (Waldemar v. Berry, 74 Mich. 424.) Counsel do not claim that the judgment can

be sustained upon any theory of set-off or counter-claim.

Our conclusion is that the trial court went too far, in entering a judgment which is ostensibly in favor of the plaintiff, but, in effect, is in favor of the defendant, upon an issue which was not properly before the court for determination. The only judgment the court was authorized to enter under the facts shown and the issues presented, was a judgment of dismissal, or for the defendant for costs merely.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

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THE FREDERICKSON COMPANY,
a Corporation,

Defendant in Error,

vs.

S. A. LEWINSOHN,

Plaintiff in Error,

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 17

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The Municipal court entered a judgment against the plaintiff in error for \$800, after striking his amended affidavit of merits from the files.

The plaintiff's claim, as set forth in the amended statement of claim, is "for goods, wares and merchandise bargained, sold and delivered by the plaintiff to defendant at the special instance and request of defendant," which merchandise consisted of 1,000 "daily pad" calendars delivered to defendant at different times between December 9, 1912, and December 30, 1912. The affidavit attached to the statement of claim states that this is a suit "upon contract for the payment of money; that the nature of the plaintiff's demand is for goods, wares and merchandise sold and delivered as above set out in the amended statement of claim," and that there is due to the plaintiff \$800, etc.

To this statement of claim, plaintiff in error filed an affidavit of merits, stating that he had a good defense upon the merits of the whole of the plaintiff's demand: "that said goods, wares and merchandise were not the goods, wares and merchandise which were sold to the defendant, in that (1) they did not contain the reading matter which the plaintiff agreed should be placed upon the same," viz: the words "corner of Dearborn street," (2) the calendars "were to be securely fastened to a double mat," and were not, in fact so fastened, (3) the calendars "were to be numbered



The first thing I noticed when I stepped out of the car was the smell of the sea. It was a salty, bracing scent that seemed to fill the air. I had heard that the coast was beautiful, but I didn't realize how much it would affect me. The sun was shining brightly, and the water was a deep, vibrant blue. I felt a sense of peace and tranquility that I had never experienced before. The waves were crashing against the shore, creating a rhythmic sound that was both soothing and invigorating. I took a deep breath and felt the sun on my face. It was a perfect day, and I knew that I was in for a great experience. The beach was wide and sandy, with a few people scattered in the distance. I walked along the shore, feeling the sand between my toes. The water was just what I needed. I had been so stressed lately, and this was a chance to relax and enjoy the moment. The sun was low in the sky, and the colors were beautiful. I had found a special place, and I was going to make the most of it. The first thing I noticed when I stepped out of the car was the smell of the sea. It was a salty, bracing scent that seemed to fill the air. I had heard that the coast was beautiful, but I didn't realize how much it would affect me. The sun was shining brightly, and the water was a deep, vibrant blue. I felt a sense of peace and tranquility that I had never experienced before. The waves were crashing against the shore, creating a rhythmic sound that was both soothing and invigorating. I took a deep breath and felt the sun on my face. It was a perfect day, and I knew that I was in for a great experience. The beach was wide and sandy, with a few people scattered in the distance. I walked along the shore, feeling the sand between my toes. The water was just what I needed. I had been so stressed lately, and this was a chance to relax and enjoy the moment. The sun was low in the sky, and the colors were beautiful. I had found a special place, and I was going to make the most of it.

consecutively according to the day of the month and year," and were not so numbered, (4) "said goods and merchandise should have been delivered on the first day of December, 1918, but the same were not so delivered;" and that the alleged defective condition of the calendars was not discovered, and defendant was unable to discover the same, until the calendars had been in use for several months, and the "wear and tear incident to the use which they were put to revealed that condition."

On motion, this affidavit of merits was stricken from the files, and judgment was entered, as by default, for want of a sufficient affidavit of merits. It is now insisted that the affidavit of merits states a good defense to the plaintiff's claim, and that the court erred in striking it from the files and entering judgment.

It will be noticed that this affidavit of merits does not allege that there was any express warranty of quality or condition, nor does it aver that the defendant in error was the manufacturer of the calendars sold to plaintiff in error, nor that the calendars were made "to order." It admits, in effect, that plaintiff in error received and used the calendars and did not return or offer to return them at any time. Therefore it appears that the only defense sought to be interposed by plaintiff in error to a suit brought against him to recover the price or value of existing chattels sold and delivered to him without any warranty, expressed or implied, was that because of certain alleged defects in the quality or description of the goods delivered, he refused to pay for them, notwithstanding the fact that he received and used them and continued to use them even after the alleged defects were discovered.

"The rule is, that if an article is to be made or supplied to the order of a purchaser there is an implied warranty of the fitness of the article for the special purpose designed by the buyer,

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if that purpose be known to the vendor; but in the bargain and sale of an existing chattel there is not, in the absence of fraud, an implied warranty of good quality or condition of the thing sold." (Telluride Power Co. v. Crane Co., 308 Ill. 219-227.)

"The law does not permit a person to receive goods under a contract, appropriate them to his own use, and then defeat an action for the purchase price on the grounds that the goods were not of the exact quality or description called for by the contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within a reasonable time after the departure from the terms of the contract is discovered." (America Theatre Co. v. Siegel & Co., 321 Ill. 143-147.)

Under the principles above quoted, the affidavit of merits did not state any valid defense to the plaintiff's cause of action. The statement at the conclusion of the affidavit, that the goods should have been delivered on December 1st, when, in fact, they were delivered later during the month of December, is not followed by any statement that that fact caused the plaintiff in error any damage, and, moreover, this statement is apparently inserted in the affidavit only as one of the alleged facts supporting the theory that the goods delivered "were not the goods sold." Hence the court did not err in striking the affidavit from the files and entering judgment.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

ARNT HENDRICKSON,

Plaintiff in Error.

} ERROR TO

} MUNICIPAL COURT

} OF CHICAGO.

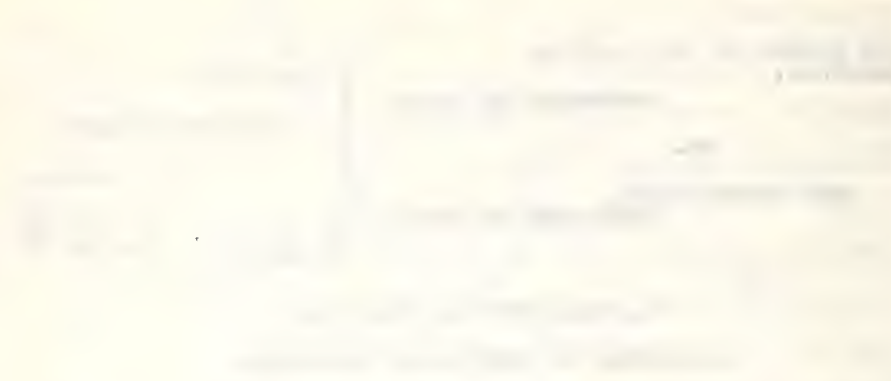
} 191 I.A. 20

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

In this case, plaintiff in error was found guilty of wife abandonment, and was ordered to pay to his wife \$5 a week for one year, for her support. This writ of error is prosecuted to reverse that order.

The trial was had before the court without a jury. There were but three witnesses, viz: plaintiff in error, his wife and Henry Martin. Martin merely testified to the amount of salary plaintiff in error was receiving as one of the traveling salesmen of a clothing house. Plaintiff in error and his wife have been married about thirty years and have had several children, who are now all of age. It is apparent from the evidence that they quarreled frequently. Mrs. Hendrickson testified that her husband was "drunk about half the time." He testified that he had been drunk but four times in his life and that if his wife "smells a glass of beer, she says I am drunk." Several years ago, for some reason not shown in the evidence, they separated. Apparently, however, this separation did not last long. In January, 1915, there was a quarrel in which the youngest son, then 23 years of age, interfered. The family then consisted of the plaintiff in error, his wife, the youngest son and a daughter. Plaintiff in error and his wife do not give the same version as to the cause of this quarrel or what was said, but he admitted that he "packed and left" the house, saying that he "didn't think there was room for his there." On



The following table shows the results of the experiments conducted during the year 1875-76. The table is divided into two main sections, one for the first half of the year and one for the second half. Each section contains a list of experiments, with the date, the name of the experimenter, and the results of the experiment. The results are given in terms of the amount of material used, the time taken, and the quality of the product. The table is as follows:

Date	Experimenter	Results
Jan. 1	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jan. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jan. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jan. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jan. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jan. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jan. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Feb. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Feb. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Feb. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Feb. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Feb. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Feb. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Mar. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Mar. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Mar. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Mar. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Mar. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Mar. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Apr. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Apr. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Apr. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Apr. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Apr. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Apr. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
May 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
May 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
May 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
May 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
May 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
May 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jun. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jun. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jun. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jun. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jun. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jun. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jul. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jul. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jul. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jul. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jul. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Jul. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Aug. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Aug. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Aug. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Aug. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Aug. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Aug. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Sep. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Sep. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Sep. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Sep. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Sep. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Sep. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Oct. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Oct. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Oct. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Oct. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Oct. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Oct. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Nov. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Nov. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Nov. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Nov. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Nov. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Nov. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Dec. 5	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Dec. 10	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Dec. 15	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Dec. 20	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Dec. 25	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.
Dec. 30	John Doe	100 lbs. of material used, 2 hours taken, 100 lbs. of product.

several occasions between that time and May, 1913, he returned home for a night or two, but from May until September, when the information was filed, he remained away continuously, and during this time the only contribution he made to the support of his family was about \$25. Once Mrs. Hendrickson asked him "for clothes," and several times the daughter asked him for money for family expenses, but without result other than promises, except as above stated. He was drawing \$125 a month during all this period, but claimed that after paying his personal expenses and "entertaining his customers," he had only \$40 a month left.

It is contended that upon this evidence the prosecution failed to make out a case of wife abandonment. It is urged that the abandonment contemplated by the statute must be of such a character as would if continued for two years, sustain a charge of desertion in a suit for divorce; that to establish desertion, an intention not to resume cohabitation must be shown and an absence of the wife's consent to a separation; and that to establish abandonment, three elements are necessary to be shown: first, the act of abandonment; second, neglect; and third, refusal to provide for the wife. Whether all of these contentions are sound, it will not be necessary for us, in this case, to decide, for, assuming them to be correct, we think the evidence fully warrants the finding of the court. Even upon his own evidence, he wilfully deserted his wife in January, 1913, and we think that his actions after that time, and particularly after the month of May, 1913, do not indicate any intention at any time, to resume cohabitation in the ordinary sense of that term. That he neglected and failed to provide for his family from that time on, is not denied. It is claimed, however, that before a husband can be found guilty of refusing to provide for his wife, within the meaning of the statute, something more must be shown than a mere failure or neglect to so provide,

that there can be no refusal without a previous demand. Denoed-
ing, but without deciding, this to be true, we think there is
sufficient evidence in this case of such a demand and a refusal.
The daughter, at least, made several requests of that nature, and
we think his failure to keep his premises, when able to do so,
is equivalent to a refusal on his part. Counsel for plaintiff in
error insist that the wife consented to the separation. We find
no evidence fairly tending to support that theory. She testified,
and he did not deny, that at the time he left in January, 1913,
she told him he would "better think it over" before he went, and
on the occasions when he temporarily returned, she evidently tried
to induce him to remain.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The second part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The third part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The fourth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The fifth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The sixth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The seventh part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The eighth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The ninth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The tenth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one.

77 - 19934.

JULIA C. HARDE,
Appellant,

vs.

HENRY HAMBURG, et al.,
Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

191 I.A. 28

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

This suit is another of the same character as Nos. 19909 and 19943. The bill filed in this case contains the same allegations, in substance, as in No. 19962, and for the reasons stated in the opinion filed in that case, the decree dismissing the suit for want of equity will be reversed and the cause remanded.

REVERSED AND REMANDED.

88 - 20,003.

ILLINOIS LIFE INSURANCE COMPANY,
a Corporation,

Defendant in Error,

vs.

EDWARD T. KENNEDY,

Plaintiff in Error.

BRANCH TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 29

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

By this writ of error the plaintiff in error seeks to reverse a judgment entered against him by confession upon a promissory note. The judgment was opened to allow him to make a defense, but upon a trial before the court, the defense failed. It appears from the evidence that on June 4, 1912, plaintiff in error made application to defendant in error, through one of its agents, named Snow, for a twenty-payment life insurance policy for \$12,000. At the same time, he gave a judgment note to Snow for the amount of the first premium, \$338.80, payable one-half "on August 15th" and the remainder "on October 15th." Snow indorsed and delivered the note to the insurance company, and the company issued its policy and sent it, by Snow, to plaintiff in error. When the policy was delivered to him on June 28, 1912, plaintiff in error signed a receipt for the same, stating that he had examined and accepted the policy "as issued and on which I have paid the annual premium, amounting to \$338.80." On November 1, 1912, nothing having been paid on the note, the attorney for the insurance company notified Kennedy by letter that the note had been placed in his hands for collection and that he was instructed to have judgment entered upon it in the Municipal Court, unless "immediate arrangements are made" for payment. To this letter, plaintiff in error replied, under date of November 3, 1912, saying, "It is my intention to pay this note, but it is absolutely impossible for

me to do anything for at least a month, and then I can only pay a part of it. * * * If you see fit to obtain a judgment against me, you are at liberty to do so, but I cannot see what good a judgment would be to you." Ten days later, a judgment was entered for \$346.30, under the power contained in the note, and on November 21, 1912, plaintiff in error was notified of that fact by letter. He replied on the next day, offering to pay in installments of \$25 a month. This offer seems to have been accepted, and three installments of \$25 each were paid, the first in December, 1912, the second in January, 1913, and the third in March, 1913. When the last of these payments was made, plaintiff in error was reminded that he was behind in his payments, but apparently nothing further was done until May 10, 1913, nearly six months after the entry of the judgment, when plaintiff in error made a motion in the Municipal Court to vacate the judgment, and an order was entered that the judgment be opened to allow him to make his defense, the judgment to stand as security. Thereupon the plaintiff in error filed an affidavit of merits, in which he claimed that Snow told him, at the time he executed the judgment note, that if he desired to cancel his policy at any time before the note fell due, he might do so "without any liability" to the insurance company, that the company took the note with knowledge of that fact, and that when he received the policy he at once returned it to the company to be cancelled in accordance with this alleged understanding. Upon the trial, the plaintiff in error testified, in substance, that the facts were as stated in his affidavit of merits. He was flatly contradicted, however, by the agent, Snow, and the letters and partial payments above mentioned are wholly inconsistent with this belated defense. The preponderance of the evidence is clearly in favor of the defendant in error.

It is claimed, however, that there was no consideration for the note, because there was a clause in the application which provides

that the company should incur no liability "until the first premium has actually been paid to and accepted by the company, or its authorized agent," and until the policy has been actually delivered to and accepted by the insured. The evidence shows that the company accepted the note in payment of the premium, and that when plaintiff in error received the policy, he signed a receipt stating that the annual premium had been paid. Moreover, the provision is one for the benefit of the company alone, and therefore could be waived by it if it chose to do so. There is no merit in the contention.

It is finally claimed that the act of the insurance company in accepting a promissory note, instead of cash, in payment for the first premium, was a violation of the Act of June 19, 1891, prohibiting unjust discriminations by life insurance companies between insureds of the same class. Plaintiff in error cites People v. Commercial Insurance Co., 187 Ill. 98, in support of this contention. Instead of supporting this contention, the case cited is directly against it, in so far as the point was mentioned at all. It was not even claimed in that case that the mere acceptance of a note for the amount of the first premium constitutes an unjust discrimination, within the meaning of the statute. There an insurance company, being guilty of discrimination of an entirely different character, sought to avoid the penalty of the statute by claiming that the policy had never taken effect because a note that was given for the amount of the first premium, had never been paid. As to this claim the court said: "An unconditional delivery of the policy, however, operates as a waiver of the pre-payment of the premium, notwithstanding an express provision therein that the company shall not be liable until the premium is actually paid." Moreover, as is pertinently suggested by counsel for the defendant in error, there is no evidence that any discrimination was made in this case even if

the acceptance of a note in some cases and not in others could be held to be a discrimination.

There being no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

29053
152 - 20053.

S. F. SAYRE,
Defendant in Error,
vs.
JOHN YANGLAS, et al.,
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUDGE FITCH

191 I.A. 31

DELIVERED THE OPINION OF THE COURT.

In November, 1910, S. F. Sayre recovered a judgment in the Municipal Court against A. F. Thompson, for possession of certain premises occupied by the latter, and for \$175 accrued rent. Thompson sued out a writ of error from this court, gave a stay-of-execution bond, with John Yanglas as surety, and remained in possession of the premises until the end of February, 1911. The judgment was affirmed by the Appellate Court in October, 1912. (Sayre vs. Thompson, 172 Ill. App. 307.) Sayre then brought suit against Thompson and Yanglas, on the stay bond, to recover the amount of the judgment, costs and interest, and the value of the use of the premises for the period during which Thompson remained in possession after the judgment was rendered. After several unsuccessful attempts had been made to formulate an affidavit of a meritorious defense to this action, in which the defendants endeavored to again raise practically the same questions that were determined in the original suit, an order was entered stating, in substance, that the defendants by their affidavit had admitted the amount of the original judgment, costs and interest, to be due, and that the affidavit showed a defense to only a portion of the plaintiff's demand. A judgment was thereupon entered against the defendants for the amount of the original judgment, interest and costs, but reserving "for future determination and adjudication the matter of the balance of the plaintiff's demand." The defend-

ents sued out a writ of error from that judgment, but were again unsuccessful and the judgment was affirmed. (Sayre v. Langas, Ten. No. 18654; opinion filed May 18, 1914.) The defense interposed to the reserved claim for the value of the use and occupation of the premises by Thompson after the ^{first} judgment was entered was that the premises had no rental value whatever, because of the alleged untenable condition of the same. A trial by jury was had upon this issue, and a verdict returned in favor of the plaintiff for \$200. This writ of error was brought to reverse the judgment entered upon that verdict.

Complaint is made that the court erred in making a statement in the presence of the jury that Thompson was a trespasser after the judgment for possession was entered, and that Sayre was under no obligation to make any repairs after that time. We find nothing in the abstract of the record to show that the court made any such statement except the fact that the court instructed the jury, in effect, that an owner of property is under no obligation to keep his premises in repair when the person who is in the possession is occupying the same without any agreement and without permission of the owner. These instructions correctly state the rule of law applicable to the facts of this case. We are likewise unable to find in the abstract any of the alleged prejudicial remarks of the trial judge, as to his personal knowledge of rents in the vicinity of the property in question.

It is claimed that the court erred in excluding an offer to prove an alleged agreement on the part of the owner to make repairs. The offer related to a period of time prior to the original judgment and was therefore properly refused.

Counsel for plaintiffs in error state, in their brief, that the court refused to permit them to show that the premises were not in a habitable condition during the period in question, and

that Thompson made some repairs during that time and paid for the same. The record shows that plaintiffs in error were permitted to, and did, prove the actual condition of the premises and the repairs made upon the same during the period in question. Whether Thompson paid for any repairs made during that time was wholly immaterial, in the absence of any proof tending to show that Sayre agreed to reimburse him for the same.

It is also claimed that the court refused to permit Thompson to testify as to the rental value of the property. We do not so read the record. Mr. Thompson was permitted to tell all he knew on that subject. He testified that he had lived in the premises and paid rent for the same for a number of years; and that he paid at the rate of \$50 a month at the time the original judgment was entered against him. The question whether he knew the "market value of the premises" was immaterial. The sole question at issue was the rental value during November and December, 1910, and January and February, 1911.

The verdict allowed the plaintiff for four months' rent at the rate of \$50 a month. The occupancy was not denied. There was evidence to the effect that the premises were worth more than \$50 a month. We think the verdict is fully supported by the evidence, and that plaintiffs in error have no just reason to complain of anything said or done during the trial.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

MARGARET HOOD,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 83

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was found guilty of violating Section 10 of the Motor Vehicle Act, upon a jury trial in the Municipal Court, and was fined \$20 and costs. To reverse that judgment this writ of error is prosecuted.

The information alleges that plaintiff in error "heretofore, to-wit: on the 20th day of September, A.D. 1918, at the City of Chicago, aforesaid, did then and there upon a public highway situated within the corporate limits of the City aforesaid, drive a Motor Vehicle at a speed greater than is reasonable and proper having regard to the traffic and the use of the way so as to endanger the life or limb or injure the property of any person, informant further says that the above violation then and there occurred upon a public highway within the jurisdiction of the South Park commissioners. In violation section 10, Illinois Motor Vehicle Law."

A motion to quash the information was made and overruled. It is urged that this ruling was error because (1) is said) the information "charges an offense disjunctively," in that it alleges not only that the plaintiff in error drove a motor vehicle "at a speed greater than is reasonable and proper having regard to the traffic and the use of the way," but also "so as to endanger the life or limb or injure the property of any person." There is no merit in the contention. A violation of the statute is charged



FIGURE 1. PERCENTAGE OF POPULATION

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Prosecution in the Municipal Court by the
People of the State of Illinois ^{- against Margaret Brown} in violation of
section 10 of the Motor Vehicle Act (July 7, 1907)
Upon a jury trial the defendant was found guilty
and fined \$12 and costs. To reverse the judgment
defendant presents a writ of error.

The information alleges that

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by the first clause alone. The second clause merely charges a result of the violation, which was neither necessary to allege nor prove. In our opinion, the second clause - which is the only clause that uses a disjunctive - may be treated as surplusage, and, as such, disregarded. It is evident that a printed form of complaint was used, containing both clauses. The mere fact that the second was not scratched, does not require proof of both.

It is next urged that the allegation "that the above violation then and there occurred upon a public highway within the jurisdiction of the South Park Commissioners," was not proved. It was not necessary to prove it, under the facts of this case, for the reason that it is elsewhere alleged in the information that the violation occurred upon a public highway in the City of Chicago, and that fact was proved. Whether the highway in question was also within the jurisdiction of the South Park Commissioners, is, under such circumstances, immaterial. (People v. Lloyd, 170 Ill. App. 68.)

It is insisted that there was no proof that the offense was committed within eighteen months, and that, therefore, the court erred in overruling the motion for a new trial. Division IV of the Criminal Code provides that "All prosecutions by indictment or otherwise, for misdemeanors, * * * shall be commenced within one year and six months from the time of committing the offense, * * * except as otherwise provided by law." In Larkin v. People, 94 Ill. 501, it was held that an indictment for a misdemeanor, showing upon its face that the offense was committed more than eighteen months before the finding of the same, and containing no averment bringing the case within any of the statutory exceptions, is bad, and should be quashed, on motion. In this case, the information charges that the offense was committed "on, to-wit, the 25th day of September, A.D. 1913." The information, therefore, was

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sufficient on its face to remove any objection of the kind here involved. But the information is not evidence, and there was no evidence before the jury as to when the offense occurred or the arrest was made, except that it was "lately." The word "lately," according to lexicographers, refers to any time within a recent period, such as five or ten years. (Webster's Dictionary.) While it is not necessary, in prosecutions of this character, to prove the exact date alleged in the information, it is necessary that some time be proved within the period of limitation fixed by the statute. Under the authority of *Larkin v. The People*, *supra*, if the information in this case had been as indefinite as the evidence was, - that is, if the information had alleged that the plaintiff in error committed the offense in question "or to-wit. lately" - it could not have been sustained, and the fact that the information is certain cannot supply the lack of proof. "Allegations without proof are as ineffective as proof without allegations."

In this condition of the record, we feel constrained to hold that a new trial should have been granted because of the failure to prove the time when the offense was committed, and for this reason, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS A. BARRON,
Plaintiff in Error,

vs.

ISIDOR LEVINSON,
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 35

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

In April, 1910, the defendant, Isidor Levinson, rented a flat from the plaintiff and occupied it from that time until May 30, 1911, under a verbal lease from month to month. On May 1, 1911, plaintiff served on the defendant a thirty days' notice to quit. Defendant moved out on May 30, 1911, but retained the keys of the flat. The next day the plaintiff called on the defendant and asked him for the keys. Defendant refused to give them up but sent them by mail the next day. Plaintiff thus received the keys on June 2, 1911. He sued the tenant for damage to the property, claiming \$200, and the case was tried by the court without a jury. According to the plaintiff's evidence, in which he is corroborated by three other witnesses, he found, when he entered the vacant flat on June 2, that some of the glass globes of the chandeliers were broken and scattered around the floor and others were missing; that several of the window shades were torn and a large piece torn out of one of them had been thrown on the front porch; that one of the inner doors had been cut in several places as by an axe; that part of the grill-work between the first and second rooms was broken and one of the posts had apparently been chopped by an axe; that most of the window cords had been cut and some were hanging loose; that the wood-work was scratched, dented and splintered; and upon the papered walls of the parlor and bed-rooms had been written in colored chalk and with indelible pencils the words "Beware of rats," and "Beware of bed-bugs." The undisputed evidence was that the flat was in good condition when

the tenant moved in, and that the plaintiff was required to expend a considerable sum of money to repair the damage thus found after the tenant had moved. There was also evidence that a bitter feeling existed between the landlord and tenant. As opposed to this evidence, defendant testified that when he left the flat, there "was no damage except such as might be termed 'ordinary wear and tear,'" and he produced two witnesses who testified that they were present when he moved out, and "saw no damage."

A trial was had by the court without a jury and the

The trial court found the issues for the defendant, upon the ground, as stated in the statement of facts certified to this court, "that the evidence failed to show that the defendant did or committed the acts complained of, or that the same were permitted to be done to the knowledge of the defendant."

Judgment, Plaintiff Prevails, a writ of Habeas Corpus.

The overwhelming preponderance of the evidence is to the effect that the damage above stated was done after the notice to quit was served. During that time the defendant was in exclusive possession; he refused to turn over the key on May 31st; it was not received by the landlord through the mail until June 2nd; nowhere does it appear in the record, that the defendant denied that he was at the premises in the interim between May 30th, when the defendant's household possessions were removed from the premises, and June 2nd, the day the key was delivered to the plaintiff by mail. The principle of law is well established, that where a fact material to the issue is within the knowledge of one of the parties to a lawsuit, the failure to disclose such fact, when the opportunity is offered, gives rise to the presumption that the evidence would have been unfavorable. The only reasonable inference from this record is, that the damage was deliberately committed either by the defendant himself, or by someone for whose acts he was responsible.

It may be that at another trial evidence may be offered to rebut this inference, but in the present state of the record, we believe the finding of the court was clearly and manifestly contrary to the evidence.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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GEORGE W. REDDIG, R. W. REDDIG
and F. C. REDDIG, Co-partners
as REDDIG COMPANY,

Defendants in Error,

vs.

NORMAN FRIEDENWALD,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 37

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted from a judgment for \$161.48, entered by the Municipal Court of Chicago in a suit brought by George W. Reddig, et al., a partnership, against Norman Friedenwald, for work and material furnished to the said Friedenwald.

It appears from the evidence that the defendant Friedenwald called at the plaintiff's place of business in Rock Island, Illinois, for the purpose of ordering a boiler and necessary connections for use in a building known as the Elite Theatre, also located in the city of Rock Island. An estimate was given and agreed upon, whereupon the material was furnished and installed accordingly. There was no dispute as to the amount of the bill or the character of the work.

The only issue in this case is whether the defendant, when ordering this material, acted in the capacity of principal or agent.

Defendant contends that he is not the owner of the Elite Theatre; that the Tri City Amusement Company owns it, and that when he ordered the aforementioned material, he was acting as the agent for the Tri City Amusement Company.

Plaintiff, on the other hand, contends that the material and the labor incident to its installation were furnished for the defendant Friedenwald; that at no time did the said Friedenwald claim to be acting as the agent of the owners of the Elite Theatre, but acted entirely for himself.



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A jury having been waived, the cause was submitted to the court. There were but two witnesses - George W. Heddig, on behalf of the plaintiff, and the defendant Friedenswald, on his own behalf.

The court, who saw and heard the witnesses, favored the contention of the plaintiff and found against the defendant. We have carefully reviewed all the testimony, and are firmly of the opinion that the court was warranted in arriving at its conclusion.

Finding no reversible error, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

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300 - 19037.

SIMEON P. SHOPE, JOHN M. ZANE,
LEONARD A. BUSBY and HARRY P.
WEBER, Co-partners doing business
as SHOPE, ZANE, BUSBY & WEBER,
Appellees,

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

vs.

HENRY D. LAUGHLIN,

Appellant.

191 I.A. 38

MR. JUSTICE PAN DELIVERED THE OPINION OF THE COURT.

This is an action brought by Simeon P. Shope, John M. Zane, Leonard A. Busby and Harry P. Weber, co-partners doing business as Shope, Zane, Busby & Weber, hereinafter referred to as the plaintiff, against Henry D. Laughlin, hereinafter referred to as defendant, for services rendered as attorneys and cash advanced by them as attorneys, to Henry D. Laughlin, from December 1, 1904, up to and including November 1, 1906, also for services rendered and moneys advanced by Messrs. Shope, Zane and Weber, co-partners doing business as Shope, Zane & Weber, from December 1, 1904 to the first day of December, 1906. The case was tried before a court and jury, and a verdict returned in favor of the plaintiff in the sum of \$5,000, upon which verdict judgment was entered, and from which judgment defendant has prosecuted this appeal.

Defendant first began having business relations with Judge Shope of the plaintiff firm, in the year 1900. The first transaction related to certain interests which defendant had in the Great Northern Hotel Company. At that time the firm was known as Shope, Zane & Barrett. At this time, and for several years later, defendant was interested in several corporations, in connection with which he was experiencing considerable difficulty. Among these corporations were: the National Hollow Brake Beam Company; the Chicago Railway Equipment Company; the American



The following table shows the results of the survey conducted in 1985. The data is presented in a table with 4 columns: Year, Value, and two unlabeled columns. The data shows a significant increase in the value of the survey results over the years.

Year	Value		
1980	20		
1985	80		
1990	20		
2000	60		

The data indicates that the value of the survey results has increased significantly over the years, particularly between 1980 and 1985, and again between 1990 and 2000. This suggests a positive trend in the survey results over the long term.

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Brake Beam Company; and the Northern Hotel Company.

On June 1, 1901, the firm became Shope, Mathis, Lane & Weber, being composed of Simeon Shope, John C. Mathis, John M. Lane and Harry P. Weber. Defendant has designated this firm as the first firm; and during the existence of this firm, the major part of the litigation out of which this suit arose was begun and carried on. Upon the death of Mr. Mathis, December 1, 1904, the co-partnership was continued between Shope, Lane and Weber, under the firm name of Shope, Mathis, Lane & Weber until December 1, 1908; this firm the defendant has designated as the second firm. During the existence of the second firm, litigation continued over much the same subject matter with some new developments.

On December 1, 1908, Mr. Leonard A. Busby joined the other members of the second firm, which then styled itself as Shope, Lane, Busby & Weber, and which defendant has designated as the third firm, and which was the firm in existence at the time this suit was brought. Litigation wherein some of the parties were identical, and arising out of previous litigation, was conducted by the third firm. In much of the litigation the principal opponent was one Edward S. Leigh; and the litigation in which said Leigh was involved culminated in a petition in bankruptcy being filed against him.

To give in detail the extent of the litigation out of which arose this claim for services would be entirely beyond the scope of this opinion, but an idea as to the general character thereof can be formed when we state that the services were rendered in the following causes of action:

(1) Case of Laughlin v. Leigh, involving the ownership of 18,333 shares of National Hollow Brake Beam Company stock. This is designated by the defendant as the stock case.

(2) A case between Sarah Eden, afterwards changed to Braugher, Admr., and Laughlin, involving the ownership of one-half of Laughlin's Northern Hotel Company stock. This is designated by the defendant as the Eden case.

(3) A case between Laughlin and Leigh involving 845 shares of the National Hollow Brake Beam Company stock. This is designated by the defendant as the 845-share case.

(4) A case of National Hollow Brake Beam Company v. Leigh, designated by the defendant as the Trust Fund case.

(5) A case of the Chicago Railway Equipment Company v. the National Hollow Brake Beam Company and Laughlin, designated by defendant as the Forfeiture case.

(6) A case of David B. Geer v. Laughlin, involving a seat in National Hollow Brake Beam Company board of directors.

(7) A case of National Hollow Brake Beam Company v. Leigh, upon Leigh's notes to the National Brake Beam Company.

(8) The case of Barnes v. American Brake Beam Company and Laughlin, designated by defendant as the Barnes case.

(9) The bankruptcy proceeding against Leigh, designated by defendant as the Bankruptcy matter.

(10) The case of Laughlin v. Walker.

The first important litigation out of which this claim for services arose was the case known as the Stock case, supra. When the defendant first went to see Judge Shope concerning this matter, which was shortly after January 1, 1901, defendant discussed with Judge Shope his financial condition, and stated the fact that Leigh had control of many of his stock and bond holdings in the various companies which were afterwards involved in the litigation set forth supra.

Defendant was president of the National Hollow Brake Beam Company, and also president of the American Brake Beam Company;

The following is a list of the names of the persons who have been

admitted to the office of the Secretary of the Board of Education

since the first of January, 1880, to the first of January, 1881.

The names of the persons who have been admitted to the office of the

Secretary of the Board of Education since the first of January, 1880,

to the first of January, 1881, are as follows:

1. Mr. J. H. Smith, Secretary of the Board of Education, 1880-1881.

2. Mr. J. H. Smith, Secretary of the Board of Education, 1881-1882.

3. Mr. J. H. Smith, Secretary of the Board of Education, 1882-1883.

4. Mr. J. H. Smith, Secretary of the Board of Education, 1883-1884.

5. Mr. J. H. Smith, Secretary of the Board of Education, 1884-1885.

6. Mr. J. H. Smith, Secretary of the Board of Education, 1885-1886.

7. Mr. J. H. Smith, Secretary of the Board of Education, 1886-1887.

8. Mr. J. H. Smith, Secretary of the Board of Education, 1887-1888.

9. Mr. J. H. Smith, Secretary of the Board of Education, 1888-1889.

10. Mr. J. H. Smith, Secretary of the Board of Education, 1889-1890.

11. Mr. J. H. Smith, Secretary of the Board of Education, 1890-1891.

12. Mr. J. H. Smith, Secretary of the Board of Education, 1891-1892.

13. Mr. J. H. Smith, Secretary of the Board of Education, 1892-1893.

14. Mr. J. H. Smith, Secretary of the Board of Education, 1893-1894.

15. Mr. J. H. Smith, Secretary of the Board of Education, 1894-1895.

16. Mr. J. H. Smith, Secretary of the Board of Education, 1895-1896.

17. Mr. J. H. Smith, Secretary of the Board of Education, 1896-1897.

18. Mr. J. H. Smith, Secretary of the Board of Education, 1897-1898.

19. Mr. J. H. Smith, Secretary of the Board of Education, 1898-1899.

in both of these companies Edward B. Leigh was heavily interested. The difficulties that arose between the National Hollow Company and the Chicago Railway Equipment Company were by reason of a lease that had been made from the former to the latter, and the outcome of this litigation would determine whether Leigh or the defendant would have control of the various properties that were owned by these respective corporations.

The fees for services in connection with these matters were charged upon the plaintiff's books to the accounts respectively, of Henry D. Laughlin (the defendant), the National Hollow Brake Company, and the American Brake Beam Company. One of the principal issues in the case was whether the services performed in the various cases as previously outlined, were rendered to Henry D. Laughlin personally and to be charged to his account, or to the respective companies where services were rendered apparently in their behalf.

Up to and including December 2, 1904, when the second firm was organized, practically no payments in cash were made on account of any fees; whatever payments there were, being in the form of notes. Mr. Mathis of the first firm apparently had in charge the settlement of the accounts with reference to the fees charged in the various matters in litigation. In April and May of 1904, there was considerable correspondence and conversation between the members of the first firm and the defendant, with reference to payment of the charge for services, and some notes that were past due; and on say 18th defendant executed personal notes for \$16,948.87, -viz., \$ for 12,000^{each} and one for \$488.87 - payable in three years, bearing interest annually. These notes, with the payment of a note for \$1,000, due on that day, covered all charges for services rendered in the personal cases of Henry D. Laughlin, also in the National Hollow Brake Beam and American Brake Beam cases, up to May 2, 1904.

-2-

The first firm went on taking care of the litigation pending in the courts and advising with the defendant with respect to his varied interests, and charges were being made on the books as in the past, - to defendant personally and to the National Heliox and American Brake Beam companies. On December 2, 1904, Mr. Mathis died, and from that period the interests of defendant were being served in the various matters in litigation by the second firm, composed of the surviving partners, doing business, however, under the same firm name.

On January 4, 1905, and again on February 15, 1905, defendant sent his check for \$1,500 to the plaintiff. The application of these payments furnishes the ground of another contention between the parties. They were applied to the services rendered from May 2, 1904, up to and including December 2nd, the date of Mr. Mathis' death, and the ending of the existence of the first firm. The defendant insists that this \$1,500 was paid on account of the notes given May 10, 1904, and should have been applied to that end. This contention, however, did not become an issue between the parties until some time in April, 1907.

In May and August, 1905, the plaintiff addressed communications to the defendant, asking for payment of the interest due on the notes given May 10, 1904, calling attention to the amount due, viz: \$1,012.81, which was a year's interest. On December 4, 1905, defendant sent the second firm a check for \$3,000, the letter enclosing the check stating to apply on account or "any old way." (Quotation marks being the writer's, viz: defendant's.) In February, 1906, the plaintiff sent a letter to the defendant, enclosing statement of cash advanced, and requesting a remittance. On the 15th of May, 1906, plaintiff addressed a letter to the defendant showing how the \$3,000 paid on December 5th previously was applied. This letter, although it does not state exactly the amount still due, shows, however, that the plaintiff did not treat the \$3,000 previous-

ly paid in the form of checks for \$1,500 each, as payments on the notes, for the reason that it shows that interest was reckoned upon the notes from the very beginning to the date of the payment of the \$5,000, and furthermore, because it reckons the interest still due on the six notes of \$2,000 each, which would be \$12,000, and treats as paid one note for \$2,000, and part of another note of \$1,887.10.

In the interim the second firm continued to represent the defendant in litigation in which he was interested, either individually or with reference to the various corporations wherein he was a dominant factor. On April 4, 1907, defendant paid to the third firm, \$2,500. The letter enclosing this account was addressed to Mr. Harry F. Weber, in care of the aforesaid firm. This letter made reference to some payments made before and after the notes of May 18th were executed, and contains the first intimation of the differences arising between the parties, that led to this cause of action; the defendant suggesting that perhaps the books of the plaintiff and those of the defendant did not correspond, with reference to the true balance due. Plaintiff claims to have sent two letters on April 4 and 13, 1907, which defendant denies having received. They were, however, admitted in evidence. They both referred to the intimation contained in defendant's letter of April 4, 1907, as to there being an error in the balance due from defendant. The letter of April 13th sets forth that the defendant requested in letter of April 4th a statement of account, and proceeds therewith to furnish a detailed statement of account as existing between the parties, from the time of the old firm of Shope, Mathis & Barrett, up to and inclusive of the date of that letter. It furthermore contains the information that had been previously conveyed to the defendant in a letter under date of May 12, 1906, as to the application of the \$5,000 paid in December, 1906, which letter de-

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defendant did not deny having received. It sets out in detail how the two checks for \$1,000 each were applied; it also gives credit to the defendant for \$1,000 advanced on April 4th to Judge Shope as a personal loan, and treats it as a payment on account; in fact, the letter is a complete statement of the application of payments made up to and including the last payment of \$2,500 as it appeared on the books of the plaintiff. In the interim the third firm had continued rendering services in matters in litigation, either on behalf of the defendant personally or for the corporations in which he was interested.

From this time on, the personal relations between the various members of the firm and the defendant became somewhat strained. First Mr. Weber took up the question of accounts with the defendant, then Judge Shope, and finally the differences became so acute that on July 17, 1907, the plaintiffs wrote a letter wherein it was stated that unless payments were made for the balance due, that they would request him to remove his business from the office, and that suit would be instituted for the amount due. On the same day, however, a letter was written to the defendant personally, concerning matters in litigation between the American Brake Beam Company and the Chicago Railway Equipment Company. After that period letters passed frequently between the parties litigant, and in addition to these letters, others passed between the defendant and Mr. John M. Kane personally, all of which have an important bearing in the determination of this case. The character thereof will be referred to later in the course of the opinion.

On July 22nd plaintiffs addressed a letter to the defendant wherein there was enclosed an exact statement of account in which ~~XXXXXXXXXXXXXXXXXXXX~~ the plaintiff claimed there was due:

Upon notes,	\$11,319.53
On open account,	7,443.71
Total,	<u>\$18,763.24</u>

There was also enclosed an itemized account of services rendered,

from which the totals heretofore mentioned were arrived at. Under letters dated July 26th and 31st respectively, defendant enclosed to plaintiff his checks for \$7,500 and \$8,000. With reference to these last payments of \$12,500, it is well to observe at this time the fact that, treating the \$8,000, viz: two \$4,000 checks, as applied upon the open account, there was due upon notes \$11,319.63; while, according to defendant's claim, if this \$8,000 had been applied as a payment on the notes there would have been due \$8,319.63. This payment of \$12,500 therefore more than paid the balance due on the notes from either point of view, by a considerable sum. This payment of \$12,500 was the last payment made by defendant. In August and September, 1907, letters passed, some referring to matters in litigation, others in regard to the account and the payment thereof. Finally the relation of attorney and client was terminated in a letter written October 2, 1907, by plaintiff to the defendant, wherein they said they would have ready to turn over to other counsel, all papers in their office of the defendant and corporations in which he was interested.

On June 1, 1908, an assignment was executed by the second firm to the third firm, of all moneys due it from defendant by reason of any services rendered defendant, by said firm. No further payment having been made, the third firm (plaintiff herein) instituted this suit for the balance, in the trial of which judgment for \$8,000 followed.

The trial of this ^{CSSB} occupied the attention of a court and jury for nearly four weeks. The original transcript of the record contains 2444 pages; it was abstracted to 809 pages. While the record is replete with numberless contentions of the defendant, a careful consideration of the same satisfies us that there are in fact but four important and controlling questions involved in this appeal.

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The first question of importance presented is, for whom were the services sued for in this case rendered?

The second question involves the correctness of certain rulings of the court upon the admission of evidence.

The third question concerns the refusal of the court to submit to the jury the 101 special and distinct findings tendered by the defendant.

The fourth and remaining question is as to the rulings of the court upon the instructions submitted by both plaintiff and defendant. We shall consider these questions ad seriatim.

Upon the first question, viz: for whom were the services sued for in this case rendered, plaintiff contends that the services, the subject matter of this litigation, were rendered at the special instance and request of the defendant: that the conversations of the defendant with the various members of the plaintiff's firm, the letters passing between them, the conduct of the defendant, all show that fact. Defendant contends, on the contrary, that where services were rendered for corporations in which he was interested, they were rendered to the corporation and not to him individually: that he did not make himself originally responsible for such services nor has any liability therefor been created by any written instrument or memorandum in writing made by the defendant.

The issue presented by this question is clearly one of fact, which ordinarily must be submitted to the jury for determination. Our reading of the brief and argument on behalf of the defendant clearly impresses us with the belief that the defendant does not seriously contend that this issue should not have been submitted to the jury, because repeatedly in the course of the brief and argument he admits that there was a sharp conflict in the material evidence offered on this question. Defendant, however, does complain that the verdict is contrary to the weight of the evidence. All the evidence that was offered had a distinct

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bearing upon this question. All told, there were fourteen witnesses in the case, seven each for the plaintiff and the defendant. Six of these witnesses testified with reference to the value of the services, irrespective of the question for whom they were rendered, and therefore their testimony can only affect the question as to the amount of the verdict. Of the remaining eight, two were employees of the defendant and plaintiff respectively, viz: Hamilton K. Sently for the plaintiff, who was the bookkeeper for plaintiff, and testified with reference to record evidence in the form of books, letters and documents offered as exhibits having a bearing upon the issues; and Smith E. Allison on behalf of the defendant, who was secretary and treasurer of the National Hollow Brake Beam Company, who in the main also testified with reference to records in the form of minutes of meetings, notes and documents submitted by defendant, also having a bearing upon the issues. Two other witnesses, - Owen H. Fay and R. J. Harcock - were called to testify on certain facts offered to support the contention of the defendant. The witnesses upon whose testimony the jury would have to rely in order to reach a conclusion, were, in our opinion, the three members of the plaintiff firm, who were members continuously of the successive firms who transacted business for the defendant, viz: Judge Shope, John W. Kane and Harry P. Weber and Judge H. D. Laughlin, the defendant, who not only took the stand but also conducted part of the case on his own behalf.

The witness Judge Shope who was a member of the firm with whom defendant first had business transactions in 1900, testified as to conversations with defendant, wherein he (defendant) stated that the services that were rendered in the National Hollow and American Brake Beam cases were to be considered his indebtedness; that with reference to services rendered the National Hollow Brake Beam Company matters, ~~that~~ there was a clause in the lease existing between the National Hollow Company and the Chicago Railway Equip-

ment Company, whereby it was provided that if any difficulty arose and legal expenses were incurred, the Chicago Railway Equipment Company would be liable therefor, and he was therefore requested to keep separate and distinct charges on the books of the plaintiff, against the National Hollow, so there might be no dispute as to just what those services were worth, when it became necessary to prove that amount in the event of litigation against the Chicago Railway Equipment Company; that it would be just as well, perhaps better, that all fees for services performed in connection, with the litigation of the National Hollow and American Brake Beam companies, be charged on the books to the respective corporations, as an account kept in that way would enable defendant to know what to charge against the companies in his adjustment with them. This conversation took place in Mr. Mathie's office some time after June 1, 1901. The witness further testified that no claims that he was not primarily liable were ever made by defendant until he was crowded for payment of the \$10,345.07 notes, which was in 1907.

Mr. Heber testified to a conversation which took place about 1902 in the office of John C. Mathie, where there was a discussion as to bills that had been rendered defendant for services: that at that time the defendant did not criticize the work that had been performed and did not question the charges, but that he did not like the method of a per diem charge; and that he was going to pay them: furthermore, that for convenience in his relations with the several companies, he wanted separate statements so he could keep account of the charges made and services performed on the various cases against the several companies.

Mr. Kane, on behalf of the plaintiff, stated that on the day before the notes were given for all services rendered up to May 2, 1904, he was called into Mr. Mathie's office: that the subject of discussion was the question of the fee in the litigation of the National Hollow Brake Beam Company v. Chicago Railway Equip-

ment Company, and at that time the very matter was mentioned, whether the plaintiffs were working for the National Hollow Brake Beam Company or for the defendant, and the latter said they were working for him.

Defendant in his testimony denied that he had the afore-said conversations with the various members of the plaintiff firm. If the testimony in the case was confined to just these statements, it still would present a question of fact. However, both sides refer to record evidence as supporting their respective contentions. We cannot set out at length the mass of correspondence and record evidence that was offered, but will content ourselves by stating that in our opinion the record and documentary evidence, ^{as a whole} tends to support the contention of the plaintiff rather than that of the defendant. In arriving at this conclusion, we are mindful of the fact that the record evidence shows that the books of the plaintiff contained charges against the National Hollow and American companies for services rendered in litigation in which they were involved; and that the books contained no record of any charge for such services against the defendant individually; and further, that bills for such services were rendered directly to the corporations. The plaintiffs in their testimony just above mentioned, introduced evidence showing the circumstances under which these charges were made, and in our opinion their explanation is strongly corroborated by many letters written by the defendant. In the course of a letter under date of July 1, 1905, addressed by defendant to the plaintiffs, which letter was evidently a reply to letter from plaintiffs asking for the interest due on the notes, defendant states as follows:

"As unable to find any statement of account of that date. (referring to date previously mentioned in the letter.) One was doubtless rendered and if not too much trouble, wish you would have a copy made for me, so that I will know what to charge against the companies in my adjustment with them." (Language in parenthesis is ours.)

In the course of a letter dated April 4, 1907, written by defendant to plaintiffs, defendant writes as follows:

"With this check added the aggregate amount which I have paid your firm for account of services to date is \$12,500. (This includes payments made prior to the giving of the notes May 18, 1904.) My recollection is that you have received no money whatever from the N.H.B.B. Co. direct or from the A.B.B. Co. If you have, of course, they are to be added, but I am pretty certain you have not." (Language in parenthesis is ours.)

Furthermore, the jury might well lay great stress upon the fact that the defendant gave his personal notes in payment not only of the services admittedly rendered by the plaintiffs to him personally, but also for services rendered to the various corporations, from 1901 to May 2, 1904.

Defendant urges that he was coerced into signing the notes, because of his dependency upon plaintiff's firm in the various matters of litigation. There is no evidence in the record, however, of any kind, so far as we have been able to determine, which in any way shows any objection made by the defendant to the signing of these notes. Whatever force there is to such contention of the defendant was clearly a question of fact for the jury.

The contention between the parties as to the application of the money paid from time to time by the defendant has an important bearing on the question under discussion. After the notes were signed the first firm continued having charge of the various matters in litigation. Mr. Mathis died on December 2, 1904; however, the surviving members constituting the second firm continued in charge of the litigation. In January and February, 1905, defendant sent letters to plaintiff enclosing checks for \$1,500 each. The letters were silent as to the application of these payments to any particular account. Plaintiff applied this \$3,000 on account of services rendered to defendant and the National Heliox and American companies, from May 2 to December 2, 1904, the latter being the date of Mr. Mathis' death; in other words, these two checks of \$1,500 each and the notes given on May 18, 1904, paid for whatever services had been

renders by the first firm to defendant personally, or to any of the corporations in which he was interested.

Defendant claims that these two checks were paid on account of the notes: that he told Mr. Weber that while these notes were due in three years, with interest payable annually, ~~that~~ he would endeavor to pay off \$2,000 every three months; that all payments would be by check to the firm and must be treated as payments on the notes. Mr. Weber, however, denied that there had been any conversation relating to the payment of \$2,000 every ninety days, after the notes were given, but said that if any conversations of that character took place, it was before the notes were given: he furthermore denied that defendant ever ^{stated} ~~xxxxxx~~ to him after Mr. Cathis' death that all payments would be by check to the firm and must be treated as payments on notes.

After the payment on February 15, 1905, plaintiff wrote defendant two letters - one in May and one in August, 1905 - calling defendant's attention to the fact that the first year's interest on all the notes was due on May 15, 1904. The record is barren of any reply on the part of the defendant, that he should be allowed any interest for the payment of \$2,000 prior to May 15th, and the jury might well look upon these letters as notice to the defendant that these payments were not applied on the notes. Moreover, a payment followed on December 4th, of \$4,000. The letter enclosing this check for \$4,000, which was addressed by the defendant to the plaintiff, states it was to apply on account or "any old way."

In May 15, 1906, plaintiff addressed a letter to defendant, showing how this \$4,000 paid December 4th previous, was applied. From this latter defendant could clearly see that plaintiff did not treat the \$2,000 previously paid in the form of checks for \$1,000 each, as payments on the notes, for the account in this letter shows that interest was reckoned upon the notes from May 15, 1904, to the date of the payment of \$4,000, and that this \$2,000 paid only one

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note of \$2,000, and part of another for \$1,887.19; that the balance of the \$5,000 was applied upon interest due on all notes December 12 (date of \$5,000 payment) and that there ^{were} ~~xxx~~ still due six notes for \$2,000 each, and the one note for \$948.87.

No further payment was made by the defendant until April 4, 1907, and it is in the letter of April 4th enclosing a payment of \$2,500, that we have been able to find the first record evidence of any complaint on the part of the defendant as to the state of the account and the manner in which previous payments had been applied. In a letter dated April 4th, written by Mr. Lane, plaintiff at once takes notice of this intimation contained in defendant's letter that there might be some error in the account, and warns defendant that these notes must be paid. This was followed by a letter under date of April 13th, wherein the receipt of \$2,500 contained in defendant's letter of April 4th was acknowledged, and also contains an itemized statement of the condition of the account and the application of all moneys theretofore received by plaintiff from defendant. These two letters defendant claims he never received. The circumstances with reference to the writing and mailing of them were submitted, and the court ^{properly} admitted the letters in evidence. These letters clearly brought home to the defendant the fact that moneys had been applied to the various services rendered not only for the defendant, but for the corporations in which he was interested, and it recapitulated the accounting in the letter of May 14, 1906, showing how the \$5,000 had been applied - clearly indicating that the previous \$2,000 was not applied on the notes, but to the open accounts.

Between April 4 and July 23, 1907, - the date of the next payment - there was additional correspondence between the parties, of a rather contentious character. However, plaintiffs in the meantime rendered services in various matters in litigation and continued to do so until the relationship of attorney and client

was terminated by a letter written by plaintiff to defendant on October 2, 1907. On July 30th, defendant paid \$7,500, and on July 31st, \$5,000. Before these payments were made, defendant had received a statement of his account, showing that the plaintiff claimed due the sum of \$18,778.24, and further, that of this amount \$11,519.53 was due on notes, and \$7,448.71 on open account. The jury well had the right to regard the fact that these two payments aggregating \$12,500 exceeded by more than \$1,000 the amount still due on notes under plaintiff's statement of account, and by more than \$4,000 under defendant's contention as to the application of the \$5,000, as strongly corroborative of the plaintiff's contention that the defendant was responsible for all the services rendered by the plaintiff's firm in the various matters in litigation.

It is because the issue regarding the application of the payments was bound up so closely with the question as to who was liable for services rendered by the plaintiff in all matters in litigation, that we have so extensively referred to these letters, which constitute practically the entire evidence as to the application of payments. The jury may properly have considered these letters showing how the payments had been applied, as strongly corroborative of the testimony of the various members of the plaintiff firm, that the services rendered in the various matters in litigation were all to be charged to the defendant. Perhaps the expressions that defendant used with reference to Mr. Lane, in a letter written under date of July 18, 1907, may have led them to give greater weight to the testimony of Mr. Lane than to that of the defendant. In that letter - which was in reply to a letter from the plaintiff, wherein defendant was requested to take away his business from the plaintiff's office - this language is used by the defendant:

"Have just succeeded in reaching Mr. Brace over the phone and am going now to see him and request that he take charge of all matters in your hands. It involves one of the regrets of my life but I see nothing else to do. I fully appreciate the loyalty, ability and devotion which John W. Lane has shown for me and my interests and I repeat here, which I have so often said I believe to each and all of you, that I owe him a debt over, above and beyond everything he may claim to be yet due him, a debt I will some day discharge in my own way and when I find it convenient."

This tribute to Mr. Lane, before there had been any suit, may have created a stronger impression with the jury than the testimony of the defendant denying statements made by Mr. Lane as to conversations had with defendant on the question as to whom plaintiff looked to for payment for services. The jury may also have been impressed with the fact that the litigation of the National Helios and American companies was between the Laughlin interests on the one side, and the Leigh interests on the other, and that it was perfectly natural for defendant to ask these services to be performed for him, although the corporations were nominally the interested parties. The jury had the right, in arriving at a conclusion, to take into consideration every fact and circumstance appearing before them. By their verdict the jury concluded the issues on the question for whom the services, made the subject matter of the case at bar were rendered, in favor of the contention of the plaintiff, and we are of the opinion that such conclusion was not only reasonable, but in fact the only one that could have been arrived at by the jury from the facts and circumstances in evidence in this case.

Defendant complains, however, that he was unduly prejudiced by errors in the court's rulings on the admissibility of the evidence. It would be unusual in a case of this kind, lasting four weeks, bitterly contested on both sides, with a record containing nearly 2,500 pages, if some error did not occur in the rulings of the court on the admissibility of evidence. We are satisfied, however, that the rulings were substantially correct

if any error did creep in, and that the rights of the defendant were not in any way prejudiced thereby. Only one of the rulings complained of we consider necessary to mention in this opinion, and that is upon the admissibility of the assignment.

This assignment dated June 1, 1908, was offered in evidence in support of the right of the plaintiff to recover for the services rendered by the second firm of Shope, Guthrie, Kane & Leber, from December 3, 1904 to December 1, 1908. In the original declaration filed, the assignment was set forth in one of the counts. During the course of the trial an additional count was filed, based entirely upon the assignment. Defendant contended that the assignment was not admissible, for three reasons: (1) it could not be offered in evidence under the additional count, because the statute of limitations had run; (2) it did not in so many words assign the accounts other than that of Laughlin, viz: did not cover the accounts for services rendered the corporations; and (3) that the original instrument having been lost, no proper foundation had been laid for the introduction of secondary evidence, nor had proper proof been made that the instrument offered in evidence was a true copy of the original.

We believe the plaintiff could have introduced the assignment under one of the counts of the original declaration, and that it was unnecessary to file the additional count. Moreover, the count was not a new cause of action, but at most was merely a restatement of a defectively stated cause of action, and therefore could not be barred by the statute of limitations.

Inasmuch as we are of the opinion that the jury were correct in arriving at the conclusion that defendant was responsible for all the accounts, including those with reference to the corporations, the assignment may properly be said to cover the claim for all the services rendered during the period covered by the assignment; furthermore, under the proof offered, we believe the

court properly admitted the copy of the assignment in place of the original, which was lost.

Defendant further urges that the court erred in refusing to submit to the jury 101 special findings. They were submitted in two groups. The first, although submitted under 18 heads, contains 26 distinct findings; the second, 10; and Instruction No. 22 offered by defendant contains all the special findings contained in the first group.

A fair estimate of the character of these findings may be gained by incorporating in this opinion a few of them:

"Does the element of benefit to client enter into the question of the value of a lawyer's services, and form a part of the basis of the fair, reasonable, and customary, charges therefor where the services are like those described by the witnesses in this case?"

"What is the fair, reasonable and customary charge for a lawyer's services like those sued for in this case, when the charge is measured:

- (a) By the day?
- (b) By the half day?
- (c) By the three-quartered day?
- (d) By the hour?
- (e) By the half hour?"

"Was the note given by the National Hollow Brake Beam Company to the firm of Shope, Mathis, Kane & Weber, described by the witnesses as dated 'June 11, 1902, to cover bills to June 1, 1912,' in the sum of \$1394.40, given on account of legal services rendered by the firm of the Company?"

Was said note ever returned either to Laughlin or to the Company?"

If you find that said note was returned, state when, and how, and to whom?"

"Did Laughlin intend the two checks - of January 4, 1906 for \$1800.00 and of February 15, 1906, for \$1600.00, to be applied upon payment of his notes of May 10, 1904; and if he did, did the firm of Shope, Mathis, Kane & Weber know that such was his intention at the time that it received said checks?"

No useful purpose would have been served in submitting a single one of the special findings to the jury. The offering of the special findings appears to us merely an attempt to lead the court into error and confuse the jury. And the Supreme Court,

In Chicago City Ry. Co. v. Taylor, 170 Ill. 49, states:

"The practice of submitting a large number of interrogatories in a case of this character is more likely to confuse a jury than lead to a correct result, and it ought not to be encouraged."

The purpose of submitting special findings is only to have the jury give a conclusion as to the ultimate facts. We believe that the findings submitted in the case at bar involved merely evidentiary facts, and not ultimate facts upon which depended directly the rights of the parties. As counsel for plaintiffs well say, "The giving of them would practically have been to subject the jury to cross-examination as to the entire case." Such a course has been condemned by the courts of our State, and a case strongly condemning this practice is that of C. & N. Y. Ry. v. Dunleavy, 138 Ill. 134, wherein the court said:

"In giving construction to the statute the first and perhaps the most important question relates to the scope and meaning of the phrase 'material question or question of fact.' May such questions relate to mere evidentiary facts or should they be restricted to those ultimate facts upon which the rights of the parties directly depend? Evidently the latter.

The common law requires that verdicts shall be the declaration of the unanimous judgment of the twelve jurors. Upon all matters which they are required to find they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning. * * * To require unanimity, therefore, not only in the result, but also in each of the successive steps leading to such result, would be practically destructive of the entire system of jury trials. * * * However natural the curiosity parties may have to know the precise course of reasoning by which jurors may arrive at verdicts either for or against them, they have no right under guise of submitting questions of fact to be found specially by the jury, to require them to give their views upon each item of evidence and thus practically subject them to a cross-examination as to the entire case. Such practice would subvert no useful purpose and would only tend to embarrass and obstruct the administration of justice; and so may further say that such practice finds no warrant in our statute."

To the same effect is the case of Chicago City Ry. Co. v. Jordan, 216 Ill. 580. (pp.584-5.)

We are convinced that the court did not err in refusing any of to give the special findings.

Defendant finally contends that the court erred in the giving and refusing of instructions. Defendant submitted 45 instructions to the court, (of which fourteen were repetitions,) all of which were refused. The eleven instructions tendered by plaintiff were given. Defendant contends that the jury were not given the law of the case as applied to the facts in evidence upon the theory of the defendant, and that this action of the court was contrary to the well known principle of law, that parties litigant are entitled to have the jury instructed upon their respective theories of the case.

We have carefully reviewed and considered each and every instruction offered on behalf of the defendant, and we could add to this already lengthy opinion our reasons why the court did not err in the refusal of each and every one of them. In the majority of them, a mere reading will show that they were properly refused. While the giving of several of these instructions would not have constituted error, yet we are strongly of the opinion that the refusal of them did not prejudice the rights of the defendant under the evidence in the case. While defendant has assigned as error the court's refusal of all his instructions, he is especially emphatic in arguing the court's error in refusing instructions 7, 8, 13, 22, 26 and 40.

As to instructions No. 7 and 8: If defendant had tendered these as one instruction, there may have been some force to his contention; or if the jury had been instructed to consider No. 8 only in connection with No. 7, it would not have been error for the court to have given it. Instruction No. 8 contained the words "under the other instructions of the court." This language could only mean every instruction given, thereby giving the jury a latitude that was not intended. That instruction could be controlling only upon the facts in the case ~~xxxx~~ taken when specially limited to instruction No. 7, or if 7 and 8 were given as one instruction.

tendered in the form that it was, the instruction was clearly misleading, and the court therefore properly refused it. The court having refused instruction No. 3, No. 7 standing by itself would have tendered an immaterial issue. Therefore the court did not err in refusing it.

We regard instruction No. 13 also as misleading.

Instruction No. 22 was cautionary in its nature, and the refusal of it therefore was not error. Moreover, it was bad in form and was covered by instruction No. 1 given on behalf of the plaintiff.

Instruction No. 26 was properly refused because as we read the record, there was no evidence in the record upon which to base it.

The same objection applies to instruction No. 40 tendered by the defendant.

Defendant especially complains of instructions No. 7 and 8 given on behalf of the plaintiff; the vice complained of in No. 7 being that it directs the jury's attention to particular evidence in the case. While this may be true, the facts referred to were not denied, and we do not believe that a reference thereto could have been prejudicial to the rights of the defendant.

Instruction No. 9, in our opinion was proper under the authority of Just v. Throop, 189 Ill. 127.

The amount of the verdict cannot be questioned, in view of the evidence before the jury as to the value of the services. Defendant contends, however, that he should have had the benefit of a \$1,000 credit by reason of the payment of a note on the same date the notes were given for \$16,240.07. It was a controverted question of fact whether or not a reduction of \$1,000 had been made in the accounting arrived at by Mr. Mathis on May 18, 1904, for the amount due on the note maturing May 18, 1904, and paid by the defendant. Defendant in his brief, in referring to this question,

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said: "This issue of veracity was squarely made in the correspondence with much heat on both sides." By this language the defendant clearly admitted that there was a conflict in the evidence on this issue. It thereby became a question of fact upon which we believe the verdict of the jury was correct.

We have carefully and patiently examined the voluminous record and the many errors assigned, and believe that the rulings of the court upon the evidence, the special findings and the instructions are substantially free from error prejudicial to the defendant; furthermore, that the verdict and judgment are in accordance with the facts, and that any other verdict would have been a denial of justice to the plaintiff.

Finding no reversible error, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

COLONIAL SUGAR COMPANY,
Defendant in Error,

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 40

vs.
Railway Terminal & Warehouse Company,
James B. Pugh, et al.,
Plaintiffs in Error.

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted from a judgment for \$488.87 entered by the Municipal Court of Chicago in an action brought by the Colonial Sugar Company, defendant in error and hereinafter referred to as the plaintiff, against the Railway Terminal & Warehouse Company, a corporation, hereinafter referred to as the defendant, for damages to the contents of three cars of sugar stored by the plaintiff in the warehouse owned and operated by the defendant.

At the time the suit was brought, James B. Pugh and Andrew McAnish were also joined as defendants, but before the trial they were dismissed out of the case, and the cause proceeded against the railway terminal & warehouse company alone. Trial was had before the court without a jury. *There was a judgment entered in favor of the plaintiff for \$488.87, the sum of money claimed.* Defendant conducted a storage warehouse in the city of Chicago. Plaintiff shipped three cars loaded with bags of sugar, for storage, to the defendant, at its warehouse in Chicago, about May 10, 1910. These cars were directed to F. C. Van Ness, care of the Railway Terminal & Warehouse Company, the defendant; and when these cars were delivered to the warehouse company, a warehouse receipt was issued to the said F. C. Van Ness. The contents of these cars were unloaded at the warehouse. The bags were stored in tiers seven or eight bags high, on the main floor of the warehouse, which is slightly above the street level, within twenty or twenty-five feet of doors that remained open practically the entire day. These doors lead out directly onto a switch track, and beyond

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the switch track is a public roadway known as Kingsbury street.

At the time this sugar was stored, James O. Pugh was president, and Andrew McAnah secretary and treasurer, of the defendant company. When the sugar was surrendered on the warehouse receipt at the instance of the plaintiff, to J. W. Allen & Company and the Central Candy Company, C. M. McConnell had succeeded Pugh as president, and C. W. McDonald had succeeded McAnah as secretary and treasurer, and W. H. Delrich had been elected vice president. They became the officers of the defendant corporation on November 15th, 1910.

Plaintiff offered testimony to show that the sugar when shipped about May 10, 1910, was dry and free from dust; that it was shipped in 100-lb. white cotton bags with an outer covering of burlap; that while being loaded into the cars, these bags were protected from weather and dirt; that the cars themselves were thoroughly cleaned and the sides and floors lined with thick gray white paper, for the purpose of protecting the sugar en route.

C. M. McConnell, president of the defendant company, called under Section 13 of the Municipal Court Act, testified: That he succeeded Pugh as president about November 15, 1910; that at the same time an inventory was taken, and he noticed the bags were covered with dust; that on top the dust had accumulated to the extent of one-eighth to one-fourth of an inch; that he refused to receipt to the former officers for these bags of sugar without noting the fact that these bags were "covered with dust."

The Melnrath Brokerage Company acted on behalf of the plaintiff as a selling agency. In January, 1911, a representative of this company, Charles S. Johnson, took one J. W. Allen to the warehouse of defendant, as a prospective purchaser of sugar. An examination of the sugar was made by cutting open a number of the bags. The said Johnson testified that he found the bags covered with dust, and the contents hard, and in appearance dirty or gray colored; that it was standard granulated sugar, and that in good condition,

its fair cash market value was \$4.91 per cwt.; that by reason of the condition in which it was found, the sugar was damaged to the extent of 41¢ per cwt.; that 797 bags were sold to J. W. Allen & Company at \$4.50 per cwt., and 400 bags to the Central Candy Company at \$4.50 per cwt., and that these sales represented the fair cash market value of the sugar in the condition in which it was found upon examination in January, 1911.

William Becker, receiving clerk for J. W. Allen & Company, who was called to testify on behalf of the plaintiff, stated that he received the bags delivered to J. W. Allen & Company from the warehouse of the defendant; that all the bags were very dirty; that when taken upstairs and opened, the sugar came out lumpy and dirty; that the color of the sugar was clay looking and grayish; that the bags containing the sugar, other than about 20 bags that had been cut open (evidently the bags cut open by Johnson in making the examination with the prospective purchaser Allen), were in good condition and intact.

Plaintiff presented its claim for damages against the defendant through the Weinrath Brokerage Company. Correspondence followed in which the former officers Fugh and Mcaneh participated. Under date of March 4, 1911, the defendant company addressed a letter to the Weinrath Brokerage Company in relation to the claim of the plaintiff, a paragraph of which read as follows:

"The two bills of February 9th for \$328.77 and \$180.30 respectively, seem to us to be reasonable inasmuch as we knew the sugar had been damaged by dust at the time that we took our inventory of the warehouse on November 15th, 1910. This damage was called very particularly to the attention of both Mr. Fugh and Mr. Mcaneh and we refused to receipt to them in taking over the warehouse without a notation 'damaged by dust.'"

McConnell, the then president of the defendant company, testified that he had dictated the letter, but that it was signed by H. A. Delrich, the vice president. The plaintiff also introduced the warehouse receipts in evidence.

The only evidence offered by the defendant to contradict the testimony of the plaintiff with reference to the condition of the sugar, was that given by one Frank Revil, who at the time the sugar was received, was general manager of the defendant, but at the time of the trial, occupied a similar position with the Pugh Terminal Warehouse Company. In connection with his testimony there were offered in evidence three receiving tickets showing the record of the contents of the three cars shipped to the defendant by the plaintiff. He testified to some of the bags being hard at the time of their receipt, and that some were slack, indicating that there was a loss of weight; that when he left the defendant company they were in good condition. He did not state that he had made an examination of the bags after they had been placed in the warehouse.

Plaintiff contends that it has clearly shown by a preponderance of evidence: that the sugar in question was delivered in good condition; that the bags, piled on the main floor in close proximity to the doors leading directly out onto the switching track and the street, which door was open practically all day, were unnecessarily exposed to dirt, dust and the elements of the weather; that this exposure resulted in the sugar becoming caked and saturated with dust and dirt, and grayish in appearance, by reason of which the sugar was damaged to the extent as set forth in the statement of claim, and evidence offered by the plaintiff; that the action of the defendant in leaving the bags in this condition of exposure, was careless and negligent, and showed a want of due and ordinary care on its part; that this negligence and carelessness was a violation of its duty as a warehouseman to exercise the same degree of care in the safekeeping of goods entrusted to it as a reasonably careful man would exercise in regard to similar goods of his own.

Defendant contends that the following provision in the warehouse receipt offered in evidence by the plaintiff, viz: "All

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damage to goods or property occasioned by fire, water, leakage, shrinkage, breakage, rotage, vermin, heat, frost, change of weather or from the inherent qualities of the property, by riot or any accident or providential cause at owner's risk," exempted it from liability for the negligence charged. ^{trial} The court was evidently of the contrary opinion, and we believe the court was correct in arriving at that conclusion.

Moreover, even though the warehouse receipt contained express language which might cover the charges of negligence as set forth in the statement of claim, yet defendant company could not avail itself of such provision, because of our Act relating to Railroads and Warehouses, Chapter 114, Section 348 (b), page 1889, Hurd's R. S. 1911, wherein it is expressly provided:

"A warehouseman may insert in a receipt, issued by him, any other terms and conditions: provided, that such terms and conditions shall not * * * in any wise impair his obligation to exercise that degree of care in the safe keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

Furthermore, Section 351 of the same Act expressly provides that:

"A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise. * * *"

This reduces the issue to a question of fact whether or not the acts of negligence charged against the defendant constituted a failure to exercise ordinary care for the property entrusted to it for safekeeping, i.e., the same degree of care that a reasonably careful man would exercise in regard to similar goods of his own, viz., a question of fact to be determined from the evidence. The court saw and heard the witnesses, and found against the defendant. A reading of the record in this case convinces us that the trial court was fully justified in arriving at such a conclusion.

An additional point made by the defendant is, that the action should have been brought in the name of Van Ness, in whose name the warehouse receipt was issued. It is a sufficient answer on this point to say that the plaintiff in its statement of claim based its right of action for damages to the sugar delivered to the defendant, as the owner thereof, and that the affidavit of merits filed on behalf of the defendant did not deny plaintiff's ownership in the said sugar, thereby admitting plaintiff's right of action. Furthermore, the record is replete with evidence of the fact that the defendant recognized the plaintiff as the owner of the sugar.

Finding no reversible error, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

872 - 19977.

CLARENCE E. WELCH,
Appellee,

vs.

CHICAGO & ALTON RAILROAD COMPANY,
a Corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

191 I.A. 43

STATEMENT OF THE CASE. This is an appeal prosecuted from a judgment entered in the Superior Court of Cook County for \$10,000 in favor of Clarence E. Welch, appellee, hereinafter referred to as plaintiff, in a suit brought by him against the Chicago & Alton Railroad Company, appellant, hereinafter referred to as the defendant, for personal injuries sustained by him while in defendant's employ as brakeman.

The accident occurred at Dwight, Illinois. What is known as defendant's main track - the north and southbound main - is located east of the defendant's railway station; the southbound track being nearer the station. West of the station is another main track of the defendant, known as the Peoria main. This is a single track, extending from the southbound main at a point directly north of Mazon avenue, which is the first street north of the station grounds; whence it curves southwesterly to the north line of the depot, thence in a southeasterly direction around the depot, to a point parallel to the southbound main, 200 feet south of the depot, where the two mains are connected by a crossover track; it then continues south for a quarter mile, and thence west towards Peoria. The defendant's station is between these two sets of main tracks, namely the north and southbound main, and the Peoria main.

A water tank is located between the Peoria main and the southbound main, just north of the crossover track. Considerably to the south and east of this water tank are located the roundhouse and the switching yards; the latter being known as the "graveyard."

One mile north of the station, the defendant's north and southbound main is intersected by the tracks of the Chicago, Indiana & Southern Railway Company. Between this crossing and Mazon avenue, the defendant's north and southbound main is crossed by a public highway known as the schoolhouse crossing, which is about 15 carlengths north of Mazon avenue. Between the crossover track near the water tank to the south of the station and the connection with the north and south bound main to the north of the station, the Peoria main will probably clear about 12 cars.

Immediately north of the station grounds there is a sidewalk crossing over all the tracks of the defendant. On the day of the accident, between the rails of the Peoria main, at a point 50 to 70 feet north of that sidewalk, and about 200 feet north of the station, there was a pile of cinders which extended above the rails, pretty well filling the space between the rails, about six feet long, and extending above the rails about four to six inches.

Almost opposite the station, and west of it, are the Keeley Institute and the hotel which it operates, and the station grounds between the institute and the station are maintained like a park.

On October 25, 1910, the day of the accident, plaintiff was a brakeman on a through freight train running from Chicago to Peoria. About 1:45 p.m. that day the train had reached Dwight on the southbound main; its first stop was at the C. I. & S. crossing, about one mile north of Dwight, at which point the train picked up ten stock cars from the C. I. & S. Ry. tracks. It then pulled into Dwight, and the ten stock cars and its caboose were cut off from the main train and left standing just north of Mazon avenue. The main part of the train then proceeded south beyond the crossover near the water tank leading to the Peoria main, where the plaintiff alighted and lined up the switch. This brought him into the switch yards, known as the graveyard. Ten or fifteen cars were attached to the

train in the "graveyard," and the train then backed right down the Peoria main, some of the cars passing the depot, and was brought to a standstill with the rear end of the train still on the Peoria main, about a carlength away from the southbound main. The plaintiff had dropped off about opposite the depot so that he might signal the engine crew when to stop, as the engine was on the curve at the south end, which prevented their seeing the rear end of the train. There were bushes between the tracks, which also cut off the view of the engine crew to the rear of the train. While the train was in this position, plaintiff cut two crossings - one north of the depot and one in the opposite direction.

Early in the afternoon a northbound passenger train was expected to arrive at Dwight, on its way to Chicago. If plaintiff's train had remained on the southbound main in front of the depot, it would have been between the incoming passenger train on the northbound track, and the depot. This was the situation when the crew went to lunch.

During the lunch hour another freight train from the Brighton Parks yards at Chicago, in charge of a conductor by the name of Franks, arrived at Dwight. Franks found that the cabooses and stock cars left there by plaintiff's crew, blocked his train and would not permit it to entirely clear the C. I. & N. crossing. In order not to obstruct the crossing, he had the engine of his train uncoupled, and shoved these cars and the cabooses further south on the southbound main. His train was then pulled up so as to clear the C. I. & N. crossing by about six carlengths.

At this point there is a variance in the testimony with reference to the orders as to the movement of the train on which plaintiff was working; plaintiff's contention being, that he was ordered to couple up the cuts which had been made at the crossings, and to signal the train to go down to the roundhouse on the Peoria main, and that the locomotive of conductor Franks' train would shove

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the ten stock cars and caboose onto plaintiff's train. This procedure would necessitate a forward movement of the plaintiff's train. Defendant, on the other hand, contends that Frenka's crew was to pull the ten cars back on the southbound main track far enough so as to let the main train of plaintiff's crew back from the Peoria main onto the south main, and couple to these stock cars and caboose. This would have led to a backward movement of the plaintiff's train.

While the fact whether plaintiff signalled the train to proceed backward or forward was not controlling as to the issues in the case, yet it is important to bear in mind that plaintiff testified that he signalled for a forward movement of his train, but that the train started backward contrary to his expectations; and plaintiff testified that when he noticed his train proceeding backward, he gave a signal to go the other way, but the train did not stop; and when he saw that it was backing right into the stock cars on the southbound main, he whistled and hollered, but the train continued to back; he then concluded that there remained but one thing to do to prevent an accident, and that was to disconnect the air hose, which would automatically set the brakes and stop the train almost instantly; this necessitated plaintiff's stepping in between the ends of two cars, and between the rails of the track on which the train was moving, get hold of the hose where it was coupled, and raise it from one to two inches.

While in the act of doing this and walking along with the train, his hands on the hose coupling, he tripped on the pile of cinders between the rails at the point previously described, and fell. He tried to hold on as best he could, was dragged a little ways, but finally rolled over, the wheels of several cars passing over and crushing his legs. As a result of the accident, plaintiff sustained the loss of both legs, a few inches below the knee.

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action by Clarence E. White against Chicago
and Alton Railroad Company, a corporation, to recover
damages for personal injuries sustained by plaintiff
while on defendant's freight car - returned to
court a judgment entered on a verdict in favor
plaintiff for \$10,000, defendant appeals.

The facts showed that Plaintiff was injured by
travelling on a pole 2 inches on the railroad
bed when he went between moving cars to
connect the air hose for the purpose of stopping
the train in order to avoid a collision with other
cars at certain depot grounds while assisting
Plaintiff's destination along that the movement
of the cars was an interstate commerce movement
therefore the Federal Employees Liability Act applied
The government

Plaintiff's declaration charged that this was an interstate commerce movement, and therefore the Federal Employer's Liability Act applied.

The gravamen of the charge in the three counts remaining in the declaration when the case went to the jury was, that the defendant did not provide a reasonably safe place for the plaintiff to work, in that defendant negligently permitted "piles of cinders unnecessarily to be and remain upon its track known as its Peoria main, at Dwight, Illinois, and had negligently failed to use reasonable care to inspect, discover and remove them, thereby making the track not reasonably safe for the plaintiff to work on; that defendant could have discovered the cinders had it used reasonable care; that plaintiff could not have, and was ignorant of them; that while walking on the track between the cars, which obscured his view of them, he tripped, stumbled over them, and was injured."

Because of the application of the Federal Employer's Liability Act, the defense of fellow-servant was eliminated, and the defense of plaintiff's contributory negligence was urged only in mitigation of the damages.

The defense relied on at the time of the trial, as shown by the briefs and argument of counsel, was that the accident was the result of a danger of which the plaintiff had assumed the risk, and the defendant confines its brief and argument on this appeal, to that issue, and contends that the pile of cinders was: (1) An incidental risk and hazard ordinarily connected with the plaintiff's employment; or (2) an extra hazard of which he had had actual notice; or (3) an extra hazard of which he will be presumed to have had notice because they were so patent and obvious; because they were at all times on the Peoria main; because he ran by and on this track innumerable times when cinders were on it.

Plaintiff contends that the hazard was not incidental to his contract of employment, but was an extraordinary hazard actually unknown to the plaintiff; furthermore, that it was not an obvious hazard, and that he was not chargeable with knowledge thereof.

MR. JUSTICE PAX DELIVERED THE OPINION OF THE COURT.

The sole issue, therefore, presented by the record and by the briefs and arguments of counsel for both plaintiff and defendant was, whether or not plaintiff assumed the danger and hazard created by the cinders being upon the track at the time of the accident.

There is no question but that the pile of cinders between the rails at the point where defendant met with his injury was the cause of the accident, and furthermore, that the defendant was charged with knowledge of their presence. Defendant urges, however, that the presence of the cinders was an ordinary and usual risk and hazard incidental to plaintiff's contract of employment; and further, that the plaintiff was so familiar by reason of his employment and his being in and about that track, that he either had actual knowledge of that fact, or should have had knowledge thereof; and that in continuing his employment without objection with defendant he assumed the risk of any danger that might arise thereby.

In support of its contention, defendant offered many witnesses - the station master at Dwight, the crews of the respective trains that were there at the time of the accident, section hands - all of them giving testimony in the main, with the exception of one or two, tending to show that cinders had been on this Peoria main in the vicinity of the station grounds frequently prior to the accident. Some of their testimony was limited to periods prior to the time when automatic ash pans were adopted, during which period plaintiff was not working on the through freight, but was on a local train operating between Dwight and some nearby point;

and while some testified that they saw cinders when working as members of the same crew with plaintiff, as we view the evidence, there is no testimony of any witness who could say that plaintiff himself saw these cinders or any other cinders. The defendant maintains, however, that if other men saw this condition, plaintiff must also have seen it. Plaintiff contended to the contrary, and in support thereof testified positively that he had not been on the Peoria main track in nine or ten months just prior to the time of the accident; and that although he lived in Dwight, his home was to the south of the station and he had no occasion to pass along the track or over the station grounds in that vicinity; that for two years prior to the time of the accident, he was a member of train crew on a through train between Chicago and Peoria, and that there was no occasion for him to be on the Peoria main, save in rare instances: that when his train did occupy that track on any previous occasion within two or three years prior to the time of the accident - as in the instance in the case at bar - his work consisted only in cutting cars for crossings; that the switching, if any, was done more than 800 feet south of the scene of the accident, where the switchyard known as the "graveyard" was located; furthermore, that the roundhouse was also near that point: that the only other place for switching was at the C. I. & S. crossing, more than one-half mile north of Dwight. In this evidence with reference to switching plaintiff was not contradicted by any witness either for the plaintiff or the defendant. Plaintiff further contends that the fact that the station grounds were maintained like a park, that there were many bushes between the two sets of main tracks, and the presence of a curve to the north and to the south of the depot corroborated his testimony as to the switching. The witness Harris, who worked with plaintiff four or five months continually prior to the accident, testified positively that there was no occasion for the plaintiff to be on the Peoria main in connection with his work, and that he never saw him on this track during that period.

There was evidence showing that about two years before the accident occurred defendant's engines ^{were} equipped with automatic ash pans, whereby firemen or engineers could dump ashes anywhere by merely pulling a lever and furthermore, that about 800 feet south of where this accident occurred there was a pit that was used for the dumping of ashes from locomotives.

There were also offered in evidence the rules of the company, one of which was in the form of bulletins posted at the terminals of Peoria, Dwight, Bloomington and various other terminals; the bulletin read as follows:

"All engineers and firemen are forbidden to dump ashes on main tracks and station grounds while on the main track."

At the close of the plaintiff's evidence, and at the close of all the evidence, defendant submitted to the court a written instruction to direct a verdict in its favor; the court refused the request of the defendant and submitted the case to the jury, which action on the part of the court defendant contends was reversible error.

The only theory under which this contention has force is, that there was no evidence at all fairly tending to prove the cause of action set out in the declaration; and further, that under the issues here involved that there was no evidence by which the court could submit the question of assumed risk to the jury, but should have instructed as a matter of law that the plaintiff had assumed the risk. The rule as laid down in the case of Libby, McNeill & Libby v. Cook, 212 Ill. 206, is as follows (p.213):

"A verdict for the defendant should not be directed when there is in the record evidence which fairly tends to prove all the material averments of the declaration."

The opinion further holds that the court upon this motion has no right to weigh the evidence, but that "if there is any evidence which, standing alone, is sufficient to sustain a verdict for the

plaintiff, the court must deny the motion to direct a verdict. To hold otherwise is to deny the plaintiff the right of a trial by jury."

The foregoing principle has been reiterated in many decisions since, and it is in the light of these decisions that we must review the evidence as bearing on the motion of the defendant to have the benefit of a directed verdict.

Defendant asserts first that the presence of the cinders on the track was an incidental risk and hazard ordinarily connected with the plaintiff's employment; Defendant admitted the making of the rule posted in the form of bulletin at the various terminals, forbidding engineers and firemen to dump ashes on main tracks and station grounds while on the main track; and further, that the Peoria main, the track in question, was covered by the said rule.

The existence of this rule necessarily takes out of this case the question of this pile of cinders on the Peoria main being a hazard or danger incidental to the plaintiff's contract of employment. The rule was made to be obeyed. There was no presumption in the contract of employment that this rule would be violated, and be so constantly violated as to constitute the danger brought about by its violation, a risk ordinary and incidental to the contract of employment.

Defendant, in the main, however, relied upon its other contention, viz: that the frequency of its violation constituted an obvious danger which the plaintiff, by reason of the duties of his employment, and his consequent familiarity with the track in question was aware of; and further, that the evidence is so conclusive upon that question that the court should have instructed the jury to find for the defendant.

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carefully examined into the evidence in the case so that we might

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have clearly before us a mental picture of the situation as it existed when the plaintiff met with his accident. In determining the question whether there should have been a directed verdict, reliance is placed not alone upon the testimony of the witnesses, as to the acts or words of the parties interested, but on all facts and circumstances surrounding and in attendance at the time, and for some period before the accident; hence, in considering the testimony of the defendant's witnesses as to seeing cinders upon the track and at such time when plaintiff was a member of their crew, plaintiff had the right to have taken in connection with such testimony, the fact that the switch yards were more than 900 feet to the south of the scene of the accident; that the roundhouse was located there; that the station grounds were maintained like a park; the fact that his home was in a direction away from the station grounds, and this, independent of plaintiff's testimony directly to the contrary of defendant's witnesses. Necessarily this would mean a weighing of the evidence, and this the trial court did not have the right to do: that is peculiarly a province of the jury. From a careful examination of the testimony, we are convinced that the question whether or not the plaintiff had assumed the risk of the danger of the cinders being on the track at the time of the accident became solely a question of fact for the jury.

This brings us to the contention of the defendant that the verdict of the jury was contrary to the weight of the evidence.

In passing upon this question, there must be kept in view the exact situation that presented itself to the plaintiff at the time of the injury; there was a threatened danger to the company's property; one of the defendant's rules offered in evidence by the plaintiff provided as follows: "In case of danger to the company's property, employees must unite to protect it."

At the time of the accident, plaintiff had but an instant to determine what should be done, and the doing of it, to be effective,

necessarily had to be instantaneous. That plaintiff did the right thing under the circumstances is not questioned. Defendant's counsel, in their oral argument, admitted that his act deserved honorable mention.

A case wherein the facts are quite similar, is that of I. C. R.R. Co. v. Sanders, 108 Ill. 270. A close reading of this case will show that it is quite parallel in facts to the case at bar. The defense in that case, as in the case at bar, was that the plaintiff had assumed the risk. The court quoted with approval the ruling in the case of C. & A. R.R. Co. v. Johnson, 114 Ill. 208, viz.: that the law does not require a brakeman upon a freight train absolutely to know all the defects of construction which may exist along the line of the railroad, i. e. of the particular run in which he is engaged. And the court held further:

"But it is said, the defective track and cattle-guard were in plain view, and might have been seen by the plaintiff if he had looked. The coupling of cars is a dangerous service. The work has to be done instantly when the cars come together. A slight mis-step or a false movement on the part of the brakeman may expose his life or limbs to danger. Hence it is apparent that when a brakeman undertakes to make a coupling he has no time to investigate the track and determine whether it is defective or safe. His whole attention is directed to the cars that are coming together and the dangerous act he is required to perform, and it cannot be expected that he will stop in the performance of his duty to examine the condition of the track. * * * A man whose attention is constantly directed to moving cars, and their coupling and uncoupling, cannot possibly give such attention to the ties, switch-bars, etc., over which he may from time to time have to pass. Here, when the coupling was attempted, plaintiff was between two trains. His whole attention was directed to the coupling of the train. He saw no defect in the track, and the cattle-guard was not in plain view from his position. * * * Under such circumstances plaintiff could not be chargeable with notice of the defective condition of the track."

In that case the court held that it was proper for the court to refuse to instruct the jury to find for the defendant, and affirmed the judgment in favor of the plaintiff. In the case at bar plaintiff, at the time of the accident, was working on a run extending over a distance of 135 miles one way. Moreover, although he worked on this run for a considerable period, the accident occurred

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at a place where the plaintiff was usually only required to cut crossings in the train. Like the plaintiff in the case of I. C. R.R. Co. v. Sanders, supra, his attention was constantly directed to moving cars, their coupling and uncoupling. Moreover, at the time of the accident in the case at bar, there was a situation out of the ordinary: it was a moment of great stress. When the uncoupling of the hose was attempted, plaintiff was between two cars, his whole attention was directed thereto. He saw no defect in the track, and the binders were not in plain view from his position. Under such circumstances plaintiff could not be chargeable with notice of the defective condition of the track. In this view we are further supported by the cases of Illinois Terminal R.R. Co. v. Thompson, 210 Ill. 228, and C. & N.W. R.R. Co. v. Snedaker, 225 Ill. 365.

The court had instructed the jury fully upon the law as it governs the question of assumed risk. The jury, by their verdict of guilty, necessarily found that the plaintiff had not assumed the risk at the time of the accident. In arriving at their verdict, the jury who saw the witnesses and heard them testify, had before them every fact and circumstance as developed in the course of the testimony.

We cannot say that the verdict of the jury upon the question of assumed risk was clearly and manifestly against the weight of the evidence, but on the contrary, are firmly of the opinion that the jury were fully warranted in arriving at their conclusion.

The case mostly relied upon by the defendant to support its contention, is that of C. & N.W. R.R. Co. v. Seerey, 205 Ill. 492. A careful reading of same clearly shows, however, that it is not applicable to the facts in the case at bar.

Finding no reversible error, the judgment of the Superior Court will be affirmed.

BENJAMIN WOLF,	}	ERRON TO
Plaintiff in Error,		
vs.		
ELIZABETH GLOOR,	}	MUNICIPAL COURT
Defendant in Error.		
		OF CHICAGO.

191 I.A. 62

MR. JUSTICE PAX DELIVERED THE OPINION OF THE COURT.

This is an action brought in the Municipal Court of Chicago by Benjamin Wolf, an attorney at law and hereinafter referred to as the plaintiff, against Mrs. Elizabeth Gloor, herein-after referred to as the defendant, for legal services rendered and expenses incurred by plaintiff for the defendant in and about securing her appointment as guardian of Catherine Gloor, a grand-child of the defendant. Trial was had before a court and jury, resulting in a verdict for the defendant, upon which verdict the court entered judgment.

The only question presented by the record and the argu-ment of counsel is, whether or not the verdict is manifestly con-trary to the weight of the evidence. No errors of law as to the admission of evidence or instructions to the jury were urged.

The litigation out of which this claim for services arose was the first and only litigation wherein the plaintiff acted for the defendant. The defendant's son died leaving surviving him his wife, Selma Gloor, and the aforesaid Catherine, a daughter by a former marriage. The relatives of the decedent were of the opinion that Selma Gloor was not a fit person to have the custody of the daughter. Among the relatives was one William F. Jossi, who evident-ly was acquainted with plaintiff, and through whom the defendant was introduced to the plaintiff. This introduction led to the plain-tiff's being employed by the defendant to secure her appointment as guardian of the grandchild. A petition for that purpose was filed in the Probate Court and the defendant appointed. Later on

Selma Alcor, the widow of the decedent, filed a petition to set aside the order appointing defendant guardian, and to be substituted in her stead. Services rendered in the preparation for the hearing on this petition and the actual trial thereof constituted in the main, the subject matter of this litigation. Before the hearing was had, plaintiff claims that at the request of the defendant he employed additional counsel to assist him. Upon the hearing, the petition of Selma Alcor was denied and the appointment of the defendant confirmed. On July 25d, after the hearing, and after her appointment as guardian had been confirmed, defendant paid plaintiff the sum of \$500. In November plaintiff rendered his bill for services and disbursements, in the sum of \$1019.85, upon which plaintiff credited the defendant with the aforementioned judgment of \$500. This bill was sent by plaintiff after receipt of a letter from the defendant wherein plaintiff was requested to send a bill for services, showing payments made and the amount still due.

Plaintiff urges that this letter was an acknowledgment that the \$500 was only a payment on account and that there was still indebtedness due the plaintiff. No further payments were made, and plaintiff instituted this cause of action, wherein the jury rendered the verdict herein complained of. At the trial plaintiff introduced evidence in support of the detailed itemized statement of claim for services and expenses, and also evidence as to the value of said services. Defendant urged that even though all the services testified to by plaintiff were rendered, that the \$500 paid to the plaintiff by defendant was ample payment for the value of the services rendered, and introduced evidence to support that contention: that the payment of a large sum of money to the associate counsel was arbitrary with the plaintiff. It further appeared in the evidence that some cash disbursements charged in the bill had been advanced to the plaintiff by defendant, and furthermore, that he had been in receipt of fees for additional services rendered in connection with the legal adoption of the child.

The entire issue presented to the jury was clearly a question of fact. By their verdict the jury resolved the question of fact in favor of the defendant. The court in overruling plaintiff's motion for a new trial and in entering judgment on the verdict, evidently was of the opinion that the jury were warranted in arriving at their conclusion. The question involved being purely a question of fact, we would not be warranted in disturbing the verdict unless of the opinion that it was clearly and manifestly against the weight of the evidence. Not being of that opinion and finding no reversible error, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

19486
83 - 19488.

(Schuman)

193

LEVI GOLDBSTEIN, doing business as
L. GOLDBSTEIN & COMPANY,
Defendant in Error,

ERROR TO

MUNICIPAL COURT

vs.

OF CHICAGO.

GUSTAVE FREUDENBERG, doing business
as G. FREUDENBERG & COMPANY,
Plaintiff in Error.

191 I.A. 63

STATEMENT OF THE CASE. This writ of error has been
sued out to reverse a judgment obtained by the defendant in
error, hereinafter called the plaintiff, in a suit of the fourth
class in the Municipal Court of Chicago, against the plaintiff in
error, hereinafter called the defendant. The suit was brought to
recover \$42.80, alleged to be due from the defendant to the plain-
tiff as commission for securing a purchaser for certain real estate.
The plaintiff's statement of claim, as amended, reads as follows:

"Plaintiff's claim is as follows: On or about
December, 1-09, plaintiff and defendant were both duly
licensed real estate brokers in the City of Chicago. Plain-
tiff further represents that on or about said time, the
said defendant had listed for sale a certain property at
No. 1435 Milwaukee Avenue by one Mandel Brown. Plaintiff
further alleges that the said defendant, through his agent,
Herman Weinberger, submitted the aforesaid real estate to
plaintiff for the purpose of securing a purchaser therefor,
and that said defendant through his said agent agreed to
pay plaintiff one-half of any and all sums which he would re-
ceive as compensation for the sale of said real estate to
any customer secured by said plaintiff. Plaintiff further
alleges that he secured one L. Herman as a purchaser for
said premises and that the said defendant has received as
compensation for the sale of said premises, the sum of four
hundred and eighty-five dollars (\$485), one-half of which
amounting to two hundred forty-two dollars and fifty cents
(\$242.50), and said defendant refused and still refuses to
pay said sum, to the damage of the plaintiff in the sum of
two hundred forty-two dollars and fifty cents (\$242.50),
therefore he brings his suit."

The defendant filed an affidavit of merits, the material part of
which is as follows:

"Defendant denied that he did heretofore at any
time have listed for sale a certain property at No. 1435
Milwaukee Avenue, by one Mandel Brown. This affiant fur-
ther denies that one Herman Weinberger was at any time here-
before his duly authorized agent for any purpose whatsoever.
This affiant further denies that he did at any time hereto-

fors offer Herman Weinberger or any one else whatsoever the real estate at No. 1435 Milwaukee Avenue to the plaintiff for the purpose of securing a purchaser for said real estate; and defendant further denies that he agreed to pay to the plaintiff one-half of any sums which he would receive as compensation for the sale of said real estate."

The case was tried by the court without a jury; the issues were found against the defendant and the plaintiff's damages were assessed at \$177.00. A motion for a new trial was overruled, ^{to sustain} judgment ^{there} was entered on the finding, ^{and} this writ of error followed.

MR. JUSTICE SCASLAN DELIVERED THE OPINION OF THE COURT.

The defendant first contends that the finding of the court is contrary to law. Under this assignment he has cited a number of authorities to the effect that an agent must act strictly within the powers conferred upon him; that he has no right to put himself in a position adverse to his principal, etc. The defendant, however, makes no effort to apply these authorities to the facts of this case. We have assumed, however, that the defendant intends by this assignment to assert that Weinberger was without authority to act as the agent of the defendant, or that in any event he exceeded his authority in making the contract in question. After a careful examination of the authorities cited and the evidence in the case, we are of the opinion that there is no merit in this contention of the defendant.

The defendant next contends that the finding of the court is not sustained by a preponderance of the evidence. After a careful examination and analysis of the evidence, we are unable to say that the finding of the trial court is manifestly against the weight of the evidence.

It is next contended that the trial court erred in admitting improper evidence over the objection of the defendant.

The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors, and it is not possible to give a simple answer to the question of what is the best system to use.

The second of these is the fact that the system is not a simple one, but a complex one, involving many different factors, and it is not possible to give a simple answer to the question of what is the best system to use.

The third of these is the fact that the system is not a simple one, but a complex one, involving many different factors, and it is not possible to give a simple answer to the question of what is the best system to use.

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The seventh of these is the fact that the system is not a simple one, but a complex one, involving many different factors, and it is not possible to give a simple answer to the question of what is the best system to use.

The eighth of these is the fact that the system is not a simple one, but a complex one, involving many different factors, and it is not possible to give a simple answer to the question of what is the best system to use.

Under this assignment, the defendant insists that the refusing to court erred in exclude, on his motion, the testimony of the plaintiff as to a certain conversation he claimed to have had with Weinberger. This contention is based upon the assumption by the defendant that the proof fails to show that Weinberger was the agent of the defendant and was acting within the scope of his authority at the time of the alleged conversation. We are satisfied that the proof amply supports the finding of the trial court that Weinberger was the agent of the defendant in the transaction in question in this case, and that he was acting within the scope of his authority at the time of the alleged conversation.

The plaintiff was permitted to testify to a telephone conversation which he claimed to have had with the defendant in reference to the transaction in this case. He testified that just prior to the making of the contract in question, he called up the defendant's office by telephone and asked him (the defendant) if he had any property on Milwaukee Avenue for sale; that he (the plaintiff) had a customer that wanted to buy property on Milwaukee Avenue, and that the defendant in response thereto answered over the telephone that he would send a man out to see the plaintiff about the matter. The defendant complains that the court erred in admitting this testimony, because the proof failed to clearly show that the defendant was the person with whom the plaintiff had the said telephone talk. Even if it be conceded that the defendant is correct as to the effect of the evidence, that fact would not make the conversation inadmissible. The said conversation was held by the plaintiff either with the defendant, at his place of business, or with some one there that professed to represent him, and it was in relation to the business of the defendant that was carried on at that place. It was therefore admissible. Bedair v. Ham, 341 Ill. 327, 188 Ill. 373; Wicks v. Wheeler, 187 Ill. App. 378; Gallagher v. Singer Sewing Machine Co., 177 Ill. App. 327. We are of the opinion

The first of these is the fact that the population of the United States is increasing at a rapid rate. This is due to a number of factors, including a high birth rate, a low death rate, and a large influx of immigrants. The second factor is the fact that the population is becoming more urbanized. This is due to the fact that people are moving from rural areas to cities in search of better living conditions and economic opportunities. The third factor is the fact that the population is becoming more educated. This is due to the fact that more people are attending school and obtaining higher levels of education. The fourth factor is the fact that the population is becoming more diverse. This is due to the fact that people from different ethnic backgrounds are moving to the United States and settling there. The fifth factor is the fact that the population is becoming more mobile. This is due to the fact that people are moving from one part of the country to another in search of better living conditions and economic opportunities. The sixth factor is the fact that the population is becoming more affluent. This is due to the fact that people are earning higher wages and have more disposable income. The seventh factor is the fact that the population is becoming more health conscious. This is due to the fact that people are living longer and are more concerned about their health. The eighth factor is the fact that the population is becoming more environmentally conscious. This is due to the fact that people are becoming more aware of the impact of their actions on the environment. The ninth factor is the fact that the population is becoming more technologically savvy. This is due to the fact that people are using more technology in their daily lives. The tenth factor is the fact that the population is becoming more politically active. This is due to the fact that people are becoming more interested in politics and are more likely to vote in elections.

that the present contention of the defendant that improper evidence was admitted over the objection of the defendant is without merit.

The defendant next contends that the trial court erred in excluding proper, relevant and material evidence offered by the defendant. We quote from defendant's brief under this head: "While the defendant was on the witness stand, and before completing his testimony, the court peremptorily stopped him by forbidding him to 'say anything more'." In order to show exactly how this remark of the court was called forth, we quote from the record: "Q. (By counsel for the defendant) Was that the only conversation you ever had with him? A. Well - - - Q. - - - was that the only conversation you ever had with him, with reference to this matter? A. That was the only conversation I ever had with him in reference to this matter; I never knew, up to that time, he had anything - - -. The Court: - - don't say anything more. Mr. Schaeffer: (Counsel for the defendant) All right." The witness had given a complete answer to the question asked by counsel and was attempting to testify to something not called for by the question when the court directed him not to say anything more. It is idle to argue that this action of the court in any way precluded the witness from testifying further in the case. It appears that counsel not only failed to object to this action of the court, but he expressly acquiesced therein. The present contention of the defendant hardly warrants notice.

The defendant next contends that the trial court abused its discretion in refusing to permit John Hanson, a witness called by the defendant, to testify in the case. The court at the beginning of the trial had ordered that the witnesses be excluded, but it appears that this witness had sat in the court room throughout the proceedings and had listened to the testimony given by other witnesses. There is no merit in this contention of the defendant

as it appears from the record that the defendant made no objection to the action of the court in excluding this witness, nor was there any showing made that the witness could testify to any fact material to the issues in the case. The counsel for the defendant, by his conduct at the time of the court's ruling, apparently conceded the fairness of the court's action.

The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

344 - 19743.

ABRAHAM MANASTER,
Defendant in Error,

vs.

HERMAN MOLNER,
Plaintiff in Error.

FILED TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 66

STATEMENT OF THE CASE. This was an action of the fourth class brought in the Municipal Court of Chicago, on January 30, 1918, by Abraham Manaster, defendant in error, (hereinafter called the plaintiff) against Herman Molner, plaintiff in error (hereinafter called the defendant), to recover one month's rent of \$105, alleged to be due the plaintiff under a certain lease made between said plaintiff as lessor and one A. Silber as lessee, which lease was guaranteed by the defendant. The lease covered a two story brick and frame building consisting of a store, flat and basement, located at No. 1114 North Ashland Avenue, Chicago, and was for a term of five years beginning May 1, 1912, and ending April 30, 1917. The lease was dated April 22, 1912, and the guarantee is dated April 27, 1912. The lease provided that the lessor should construct, within six months from the date of the lease, a bake-shop in the rear portion of the first floor of said building. At the time of the making of the lease the store on the premises in question was occupied by one Goldstein, who held the same under a lease from the plaintiff, the term of which ended April 30, 1912. On May 1, 1912, the plaintiff collected from Goldstein \$40 for the May rent for the store on the premises in question. The plaintiff claims that in the collection of this rent, he was acting as the agent of Silber; the defendant claims that the plaintiff was acting as the landlord of the premises occupied by the latter when he made the said collection.

On June 1, 1912, Goldstein claimed that the plaintiff had elected to treat him as a tenant from year to year of the

store on the premises in question, and he refused to vacate the same; Silber brought an action of forcible entry and detainer against Goldstein to oust the latter from the store. The issues in said action were tried by a jury, and a verdict in favor of the defendant was returned. Judgment was entered on the verdict and no appeal was prayed from the same. Goldstein retained the possession of the said store and Silber, in addition to occupying the remainder of the premises in question, occupied a store in the premises at No. 1112 North Ashland Avenue, which latter property also belonged to the plaintiff. Certain other facts necessary to an understanding of the case are stated in the opinion of the court. The case at bar was tried before the court without a jury, and the issues were found in favor of the plaintiff. Judgment was entered on the finding and this writ of error followed.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant contends: (1) that the plaintiff, as landlord of the premises in question, after the term of the original lease from the plaintiff to Goldstein had expired, accepted from the latter the way rent for the store on the premises in question; that he thereby elected to treat Goldstein as a tenant from year to year ^{of the store} on the terms of his original lease; that by this election he released Silber from the payment of rent under his lease with the plaintiff and discharged the defendant from his obligations as guarantor on the Silber lease; (2) that the judgment in the forcible entry and detainer suit brought by Silber against Goldstein in June, 1912, is res adjudicata as to Manaster, Goldstein and Silber, of the fact, that Manaster elected to treat Goldstein as a tenant from year to year, after the term of his original lease had expired; (3) that the defendant is discharged from his obligation as a guarantor on the Silber lease by the fact

that there was a substitution of the store at No. 1112 North Ashland Avenue for a portion of the premises named in the lease to Silber and that the said substitution was agreed upon by the plaintiff and Silber without the consent of the defendant.

Counsel for the defendant, in his argument on the first contention, assumes that if Manaster elected to treat Goldstein as a tenant ^{of the store} after the term of the latter's original lease had expired, this election operated to release Silber from any obligation to pay rent under the lease between him and Manaster, and the defendant would be discharged upon his guarantee. The plaintiff disputes the correctness of the defendant's theory of the law. In the view that we have taken of the defendant's first contention, it is not necessary for us to pass upon this disputed question of law. We pass to the question of fact: Did Manaster, after Goldstein's lease had expired, say or do anything from which the law would imply an election on his part to treat Goldstein as a tenant ^{of the store} from year to year, _{on} the terms of the original lease? This was one of the controverted questions of fact in the case. The defendant offered proof tending to sustain his theory of the evidence. The proof of the plaintiff tended to support the following theory of the evidence: that Goldstein, prior to May 1st, knew that the premises in question had been rented by the plaintiff to Silber; that after Silber became the lessee of the premises he discovered that the bake-shop, provided for in the lease, would not be completed before June 1, 1912; that he thereupon entered into an agreement with Goldstein that the latter should occupy the store on the premises until June 1st; that Goldstein agreed with Silber that he would move out of the said store at the latter date; that it was the intention of Goldstein at the time of the making of the said agreement to move into the store at No. 1112 North Ashland Avenue after June 1st, the latter place also belonging to the

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plaintiff; that the plaintiff was acting as the agent of Silber in collecting the May rent, and that Goldstein understood this fact. There is ample evidence in the record to support the plaintiff's theory of the evidence, and we cannot say that the finding of the trial court is manifestly against the weight of the evidence on this question. There is nothing in the plaintiff's theory of the evidence, from which it could be held, as a matter of law, that the plaintiff, by his conduct, treated Goldstein as a tenant after the term of the original lease of the latter had expired.

The contention of the defendant that the judgment in the forcible entry and detainer suit brought by Silber against Goldstein is res adjudicata as to the plaintiff, of the fact that the plaintiff elected to treat Goldstein as a tenant after the expiration of the latter's original lease, is without merit. The plaintiff was not a party to that suit, and it is a well settled rule of law in this state that no one can be injuriously affected by a judgment or decree of court, who was not a party to such judgment or decree. The defendant claims that Manaster was the real plaintiff in the forcible entry and detainer suit; that the said suit was prosecuted by him and for his benefit, and that therefore he is bound by the judgment in that case. It is a sufficient answer to this contention to say that the plaintiff introduced evidence tending to prove that he was not in any way interested in the forcible entry and detainer suit, and we cannot say that the finding of the trial court is manifestly against the weight of the evidence on that question.

We have carefully considered the third contention of the defendant, and we find no merit in it.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

*Being heard Dec 2/14
and answer filed -*

ABRAHAM MANASTER,
Defendant in Error,

vs.

HERMAN HOLNER,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

ADDITIONAL OPINION OF MR. JUSTICE
BRANLICK FILED ON PETITION FOR REHEARING.

The defendant has filed a lengthy and elaborate brief in support of his petition for a rehearing in the above entitled cause. It is practically double the size of the one filed originally in the cause, and most of it is devoted to a reargument of the case. We deem it proper, however, to file an additional opinion covering certain propositions most strenuously urged by the defendant in his petition.

The defendant argues that the evidence conclusively shows that the plaintiff was interested in the Silber - Goldstein suit, and that therefore the judgment in that case is res adjudicata as to the plaintiff, of the fact that the plaintiff elected to treat Goldstein as a tenant after the expiration of the lease of the latter. In support of this contention, the defendant cites Bennett v. Birmingham Star Mining Co., 119 Ill. 9; Cole v. Favorite, 40 Ill. 457. The principle announced in these cases is, that a person in whose behalf and under whose direction a suit is prosecuted or defended in the name of some other person, will be concluded by the judgment or decree in the said suit; that in such a case, the law regards him as the real party in interest. In the present case, it devolved upon the defendant to prove that the plaintiff was, at least, one of the real parties in interest in the Silber - Goldstein case. The mere fact, (if it can be conceded to be a fact) that he interested himself in that suit and aided Silber in

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the prosecution of the same would not prove this. "Unless a person is one of the real or nominal parties to the suit, or is so identified in interest with some of such parties that he is obliged to participate in the conduct of the proceedings if requested, he cannot be bound by the judgment. The fact that he managed the cause as agent or attorney, or interested himself in it, and aided the prosecution or defense with or without any employment for either party, will not preclude him from impeaching the judgment. Neither will his being present at the trial as a witness, though interested in the subject-matter of the controversy, bind him by the result." Freeman on Judgments, Vol. 1, Sec. 188. After a careful re-examination of all the evidence bearing on the question, we are satisfied that the trial court was justified in finding that the plaintiff was not a real party in interest in the Silber - Goldstein suit, and was therefore not bound by the judgment therein.

The defendant argues at length that we were not justified, under the record in this case, in disposing of his third contention with the comment, "we find no merit in it." The contention referred to is, that the defendant as a guarantor of the lease was discharged from the guarantee, "first, by the extension of Goldstein's lease at 1114, and second, by the substitution of the store-room at 1118 for the store-room at 1114, so occupied by Goldstein." The first part of the contention is predicated upon the theory "that the plaintiff leased the store-room at No. 1114 to Goldstein by the acceptance, ^{from} his of the rent for the month of May, and that the fact that he made this lease has been judicially determined in the Silber - Goldstein suit, and the plaintiff is bound thereby." We have, in the opinion heretofore filed in this case, stated that it was our conclusion that the trial court was justified, under the proof, in finding that the plaintiff was acting as the agent of Silber in collecting the May rent from Goldstein and that the latter understood that fact.

After a careful re-examination of the evidence, we adhere to that conclusion. It is very clear from the evidence that Goldstein paid the rent to Silber for the store at 1114 after May, 1912, notwithstanding the attempt that was made to change certain rent receipts (given by the Silbers to Goldstein) for the purpose, apparently, of showing that the said rent was paid by Goldstein to the Silbers, as the agent of Manchester. It is only fair to the defendant Wolner to say that he was not connected in any way with this attempt. We have already answered the contention of the defendant that the judgment in the Silber - Goldstein case was res adjudicata as to the plaintiff of the fact that the plaintiff elected to treat Goldstein as a tenant after the expiration of the lease from the plaintiff to the latter.

As to the second part of the contention, we find that the evidence does not sustain the claim of the defendant that there was a substitution by the plaintiff of other premises for those leased by the plaintiff to Silber. The evidence satisfies us that Silber paid rent to the plaintiff for the entire premises at 1114, but that because of the fact that Goldstein continued to occupy the store-room at 1114, Silber was obliged to rent the store-room at 1112 from the plaintiff; but it is quite clear from the proof that he also paid rent to the plaintiff for the latter store.

After a very careful examination of the various points argued by the defendant we are satisfied that the petition for a rehearing should be denied.

PETITION FOR A REHEARING DENIED.

AUGUST JACOBS,
Defendant in Error,

vs.

HENRY T. JURGENSEN and JOHN F. JUR-
GENSEN, doing business as JURGENSEN
TEA COMPANY.
HENRY T. JURGENSEN,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

191 I.A. 67

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out by the plaintiff in error, Henry T. Jurgensen, hereinafter designated as the defendant, to reverse a judgment rendered against him in the Municipal Court of Chicago, in an action of forcible entry and detainer, instituted in that court by the defendant in error, August Jacobs, hereinafter designated as the plaintiff. The defendant, together with one John F. Jurgensen, by a written lease, dated June 3, 1909, leased from the plaintiff the premises in question for a period commencing July 1, 1909, and ending April 30, 1914. The said John F. Jurgensen was made a party defendant but no summons was served upon him, and the cause proceeded against the defendant alone. It appeared that the said John F. Jurgensen had terminated business relations with the defendant and was not in possession of the premises at the time the suit was commenced. The premises described in the lease was the store room and basement in the two-story brick building situated and known as 11141-11143 Michigan Avenue, Chicago, Illinois, and it was used by the defendant as a tea store. The lease provided for the payment of rent in monthly installments upon the first day of each and every month during the term thereof. It contained, inter alia, the following provisions:

"It is expressly understood and agreed by and between the parties aforesaid, that if the rent above reserved or any part thereof, shall be behind or unpaid on the day of payment whereon the same ought to be paid as aforesaid, * * * it shall and may be lawful for the said party of the first part his heirs, executors, administrators, agent,

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attorney, or assigns, at his election, to declare said term ended, and if, at any time, said term shall be ended at such election of said party of the first part, his heirs, executors, administrators or assigns as aforesaid, or in any other way, the said party of the second part, their executors, administrators or assigns, do hereby covenant and agree to surrender and deliver up the said above described premises and property peaceably to said party of the first part, his heirs, executors, administrators or assigns, immediately upon the determination of the said term as aforesaid; and if they shall remain in possession of the same after such default, or after the termination of this lease, or in any of the ways above named, they shall be deemed guilty of Forcible Detainer of said premises under the Statute, and the said party of the second part hereby waives their right to any notice from said party of the first part of his election to declare this lease at an end under any of its provisions, or any demand for the payment of rent or the possession of the premises leased herein; but the simple fact of the non-payment of the rent reserved shall constitute a Forcible Detainer as aforesaid."

The plaintiff, at the time of the trial, and now, bases his right to a judgment in this case upon the following theory: That the parties to the lease had provided therein that the lessee waived his right to notice of an election by the lessor to declare the term ended under any of the provisions of the lease, and for any demand for the payment of rent, or for the possession of the premises; and that they had further provided in the said lease that the simple fact of the non-payment of rent by the lessee under the terms of the lease would constitute a Forcible Detainer; and that such an agreement or waiver was binding on the lessee, and the action in the present case would lie, upon the simple proof of the non-payment of the rent reserved at the time mentioned in the lease; that the receipt by the lessor of rent past due did not operate as a waiver by him of the forfeiture reserved by the lease for the non-payment of rent subsequently falling due.

There is no substantial dispute as to the facts. The only default alleged against the defendant was that he had failed to pay his rent for the month of August, 1913, at the time fixed by the lease. It appears that from the time of the commencement of the lease until the trial, the defendant had been in the habit of mailing to the plaintiff a check for the monthly rent, usually

a few days after the first of the month. The proof shows that the rent for July, 1913, was paid by a check mailed July 3rd; for June, by a check mailed June 4th; for April, by a check mailed April 4th; and for March, by a check mailed March 5th. The defendant was absent from the city of Chicago during the first part of August, 1913, and immediately upon his return on August 12, 1913, he mailed a check to the plaintiff for the August rent. The plaintiff testified that he received this check at 3 o'clock on the afternoon of August 13th, and that he at once returned the same by mail to the defendant. No objection was made that the tender was not good because it was a check, and no communication of any kind accompanied the return of the check. The present suit for possession was commenced on the following morning. There is no evidence in the record tending to show that before the plaintiff mailed the check back to the defendant he did anything manifesting an intention to declare a forfeiture of the lease. The testimony of the defendant to the effect that the return of the check was the first intimation he received from the plaintiff that there was any trouble concerning the lease, stands unchallenged in the record.

At the close of all the evidence in the case, the trial court, of his own motion, and without having heard argument of counsel, directed a verdict for the plaintiff. No opinion or statement was made by the court at the time of the directed verdict.

The defendant has argued in this court a number of alleged grounds for the reversal of the judgment of the Municipal Court. In the view that we have taken of this case, it will only be necessary for us to notice one of these. The defendant contends that, notwithstanding the fact that the plaintiff, under the terms of the lease, may have had the right to declare a forfeiture of the same because of the failure of the defendant to pay the rent for the month of August, 1913, on the first of the said month, that nevertheless, the plaintiff had the right to waive a forfeiture, and that

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket of the car. I looked around, trying to get my bearings. The street was empty, the only sound being the distant hum of traffic. I felt a sense of isolation, a feeling that I was alone in a vast, unfamiliar world. I took a deep breath, trying to steady myself. The air was crisp, almost invigorating. I started walking, my feet hitting the pavement. The ground felt solid beneath me, a reassuring presence in this strange environment. I kept walking, not knowing where I was going, but feeling a sense of purpose. The city around me was a blur of lights and colors, a chaotic yet beautiful spectacle. I felt a mix of emotions, a blend of excitement and nervousness. This was my first experience of this kind, and I was both thrilled and apprehensive. I continued to walk, the city unfolding before me like a giant, colorful tapestry. The buildings were tall and imposing, their windows glowing with light. The streets were wide and open, a stark contrast to the narrow alleys of my hometown. I felt a sense of awe, a realization of the scale and complexity of this world. I kept walking, the city becoming a part of me. The cold air was no longer a nuisance, but a welcome challenge. The bright lights were no longer blinding, but a source of wonder. I was becoming a part of this city, this moment, this experience. I felt a sense of freedom, a feeling that I was no longer bound by the rules and expectations of my old life. I was here, in this city, and I was living. I was taking a step towards a new beginning, a new chapter in my life. The city was my canvas, and I was the artist. I was creating a masterpiece, one step at a time. I kept walking, the city becoming a part of me. The cold air was no longer a nuisance, but a welcome challenge. The bright lights were no longer blinding, but a source of wonder. I was becoming a part of this city, this moment, this experience. I felt a sense of freedom, a feeling that I was no longer bound by the rules and expectations of my old life. I was here, in this city, and I was living. I was taking a step towards a new beginning, a new chapter in my life. The city was my canvas, and I was the artist. I was creating a masterpiece, one step at a time.

The city was a living, breathing entity, a complex web of life and energy. I felt a sense of connection, a feeling that I was part of something much larger than myself. The city was my home, my sanctuary, my place. I was here, in this city, and I was living. I was taking a step towards a new beginning, a new chapter in my life. The city was my canvas, and I was the artist. I was creating a masterpiece, one step at a time. I kept walking, the city becoming a part of me. The cold air was no longer a nuisance, but a welcome challenge. The bright lights were no longer blinding, but a source of wonder. I was becoming a part of this city, this moment, this experience. I felt a sense of freedom, a feeling that I was no longer bound by the rules and expectations of my old life. I was here, in this city, and I was living. I was taking a step towards a new beginning, a new chapter in my life. The city was my canvas, and I was the artist. I was creating a masterpiece, one step at a time. I kept walking, the city becoming a part of me. The cold air was no longer a nuisance, but a welcome challenge. The bright lights were no longer blinding, but a source of wonder. I was becoming a part of this city, this moment, this experience. I felt a sense of freedom, a feeling that I was no longer bound by the rules and expectations of my old life. I was here, in this city, and I was living. I was taking a step towards a new beginning, a new chapter in my life. The city was my canvas, and I was the artist. I was creating a masterpiece, one step at a time.

until he did some act manifesting an intention to declare a forfeiture, it is presumed that he has waived the right, and the lease will remain in full force; that in the present case the defendant tendered the check for the August rent before the plaintiff manifested an intention to declare a forfeiture, and that as the defendant made no specific objection to the character of the tender, he had no right to declare a forfeiture, after the said tender had been made.

We are of the opinion that this contention of the defendant is a meritorious one. The facts of the present case, - including the terms of the lease - seem to bring it squarely within the rule laid down by the Supreme Court in Gradle v. Warner, 140 Ill. 123. The lease in that case contains similar provisions in reference to forfeiture to the one in the present case, and the proof in that case, upon which the court held that the lessor of the premises in question had not declared a forfeiture prior to the time that the rent was offered, is very similar to that in the case at bar. We quote from the opinion of the court in that case:

"It is true that the lease provided that if the rent should be unpaid on the day of payment, or if default should be made in any of the covenants of the lease, it should or might be lawful for the party of the first part to declare said term ended. But the lessor had the right to waive this provision of the lease, and unless some act to manifest an intention on her part to declare a forfeiture was done, it will be presumed that she waived the right. This principle is fully sustained by Moore v. Smith, 84 Ill. 516, where it is held that a contract for the sale of land which provides for forfeiture in case of non-payment of the purchase money is mutually binding on the parties, even after default in payment has been made, until the vendor has done some act to terminate the contract. It may be that the lessor was under no obligation to give the lessee any formal notice that she had elected to declare a forfeiture, but she was required to do some act to manifest an intention to declare a forfeiture and until some act manifesting such an intention was done, the lease would be in full force; and up to the time the complainant offered to pay all the rent then remaining due, the lessor had done nothing showing, or tending to show, an intention to declare a forfeiture of the lease. But it is said the offer of the certificate of deposit was not a good tender of the amount due. Had the certificate of deposit been objected to and lawful money demanded at the time, the tender or offer of payment on a certificate of deposit would not be good. But where a certificate of deposit or a check may be offered in payment,

and the payee fails to make any objection on that account, the objection will be regarded as waived."

In view of the rule thus announced and the facts in the present case, we are of the opinion that the trial court erred in directing a verdict for the plaintiff.

The plaintiff argues that the stenographic report in this case is not, in fact, complete, and that therefore the finding of the trial court should be presumed to be justified by the evidence heard in the case. When the stenographic report was first filed in this court, the plaintiff made a motion to strike the same from the files, on the grounds that it appeared that it was not, in fact, a complete stenographic report. That motion was denied. The trial judge certifies at the end of the stenographic report that it contains, "all the evidence and testimony offered, heard or received on the hearing of the above entitled cause." We fail to see how the certificate could be fuller or broader than this. The present contention, in view of the said certificate, is without merit.

In connection with the last contention, the plaintiff intimates, rather than argues, that there was proof introduced, that is not shown by the stenographic report, to the effect that the plaintiff had manifested an intention to declare a forfeiture, before the check of the defendant reached him on August 13th. We cannot, of course, consider this contention (if it was intended to be a contention), of the plaintiff.

The judgment of the Municipal Court of Chicago will be reversed and the cause remanded.

REVERSED AND REMANDED.

513 - 19918.

MARY CHRIST,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

)
) APPEAL FROM

)
) CIRCUIT COURT

)
) COOK COUNTY.

191 I.A. 69

STATEMENT OF THE CASE. This was an action on the case in the Circuit Court of Cook County, brought by Mary Christ, appellee, hereinafter called the plaintiff, against Chicago Railways Company, appellant, hereinafter called the defendant, to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of the defendant. The accident, out of which this action grew, occurred on May 24, 1911, as the plaintiff was attempting to alight from one of the defendant's cars at the intersection of Montrose avenue and Lincoln avenue, in the city of Chicago, Illinois. The plaintiff's declaration alleges, in substance, that on the aforementioned date the plaintiff became a passenger on a certain car, operated by defendant along and upon said Montrose avenue, at a point west of the intersection of said Montrose avenue and said Lincoln avenue, and was carried on said car along said Montrose avenue in an easterly direction to said Lincoln avenue; that said car came to a stop ten feet west of said Lincoln avenue, and was then and there discharging passengers; that while plaintiff was then and there in the act of alighting from said car, and had one foot on the footboard thereof, and was endeavoring to step to the ground with the other foot, and while plaintiff was in the exercise of ordinary care for her own safety, the said car was carelessly and negligently caused to be suddenly and violently jerked, started and moved and plaintiff was thereby thrown to the ground and injured. The defendant filed pleas of the general issue and non-ownership. The case was tried before a court and a jury, and a verdict was returned finding the defendant guilty and assessing the plaintiff's damages at \$1800. The plaintiff

having remitted \$500 from the amount of damages assessed by the jury, a motion for a new trial was overruled and judgment was entered on the verdict for \$1,000. To reverse said judgment the defendant has prayed this appeal.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant first contends that the verdict is clearly and manifestly against the weight of the evidence. We have carefully examined the evidence in this case, and we have reached the conclusion that we cannot say that the verdict is clearly and manifestly against the weight of the evidence.

The defendant next contends that the damages are excessive. We cannot agree with this contention.

The defendant next contends that the court erred in giving to the jury, on behalf of the plaintiff instruction No. 4, reading as follows:

"The jury are instructed in this case that the burden of proof is upon the plaintiff and she must establish her case by a preponderance of the evidence. This preponderance, however, is not alone necessarily determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity, as shown by the evidence, of the several witnesses, for seeing or ascertaining from their own personal knowledge, the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any appear from the evidence, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent consistency, fairness and congruity of the evidence; the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances, if any, proved on the trial; and from all the evidence and such facts and circumstances determine upon which side is the greater weight or preponderance of the evidence."

It is insisted by the defendant that this instruction omitted the element of the number of witnesses testifying pro and con upon the controverted material facts in the case, and the defendant further contends that in the present case, the defendant on certain

material facts had the preponderance in numbers, and that as there was no other instruction given that supplied the omission in this one, the giving of the same constituted prejudicial and reversible error. The plaintiff insists that the instruction plainly and emphatically states that the number of witnesses testifying to a particular fact or state of facts is a matter to be considered by the jury in deciding as to the preponderance of the evidence. Whatever merit, if any, there may be in this contention of the plaintiff, we are precluded from considering the same, for the reason that the Supreme Court of this state has held that this instruction is open to the criticism made of it by the defendant, and has further stated that where the instruction appeared to work a harm to the appellant, the giving of the same would constitute reversible error. Chicago Union Traction Co. v. Hampe, 228 Ill. 343; E. J. & E. Ry. Co. v. Lawlor, 229 Ill. 321; Lyons v. Chicago City Railway Co., 253 Ill. 75. However, it is quite clear from a reading of these cases, that a party is not warranted in complaining of this instruction, unless the record shows that the question of the number of witnesses was an ^{important element} ~~essential element~~ in the case, and that the party complaining suffered by the giving of the instruction. After a careful examination of the record in this case, we are unable to see how the defendant can justly claim that it had a preponderance of the witnesses on any particular fact or state of facts material to the issues in the case. We are inclined to the opinion, that the instruction tended to the benefit of the defendant.

The defendant also contends that the instruction in question is bad for the reason that it states, "that the jury should take into consideration" the elements named in the instruction. The defendant insists that the word "may" instead of the word "should" ought to have been used. Lyons v. Chicago City Railways Co., supra. It is true that in that case the Supreme Court held that an instruc-

tion which tells the jury that they must or should consider certain elements is liable to be misleading, as tending to invade the peculiar province of the jury to weigh the evidence and to determine for themselves its weight: but the court also held, however, that the giving of this instruction did not constitute reversible error under the state of the record in that case, and we think that the same may be very fairly said as to the giving of the instruction in the present case.

The defendant complains of a modification by the court of instruction No. 13, offered by it. The instruction as offered read as follows:

"You are instructed that while you are the judges of the credibility of the witness^{es}, you have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendant, simply because such witness was or is an employe of the defendant, but it is your duty to receive the testimony of such witness in the light of all the evidence the same as you would receive the testimony of any other witness, and to determine the credibility of such employe by the same principle and tests by which you determine the credibility of any other witness." (Italics ours).

The court modified the instruction by striking out the italicized words, and the defendant contends that this action of the court constituted reversible error. We are unable to see the slightest merit in this contention. The instruction as modified was as favorable to the defendant as it could possibly ask, and the meaning of the instruction as offered was not changed by the modification.

The defendant complains that the court improperly modified instruction No. 13 offered by it. This instruction as presented read as follows:

"If you believe from the evidence that the plaintiff, by using her faculties with ordinary and reasonable care in looking out for danger, could have avoided the injury in question, and that she negligently failed to do so, and thereby contributed to the injury, if you believe she was injured, then she cannot recover in this case." (Italics ours).

The modification by the court consisted in striking out the italicized words, and in our judgment this modification worked a benefit instead of an injury to the defendant. By the instruction as offered, the plaintiff, to avoid injury on the occasion in question, was obliged to use her ~~faculties~~ ^{only} with ordinary and reasonable care in looking out for danger; in the instructions as given, there was no such limitation as to the care that the plaintiff was obliged to use to avoid the injury.

We find no reversible error in this record, and the judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

The following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of New York, for the year 1880.

For the Department of the Interior, the following persons have been appointed:

For the Department of the Marine, the following persons have been appointed:

For the Department of the Navy, the following persons have been appointed:

For the Department of the Army, the following persons have been appointed:

For the Department of the War, the following persons have been appointed:

For the Department of the Public Works, the following persons have been appointed:

For the Department of the Education, the following persons have been appointed:

For the Department of the Agriculture, the following persons have been appointed:

For the Department of the Commerce, the following persons have been appointed:

For the Department of the Finance, the following persons have been appointed:

For the Department of the Justice, the following persons have been appointed:

For the Department of the Health, the following persons have been appointed:

For the Department of the Labor, the following persons have been appointed:

For the Department of the Public Safety, the following persons have been appointed:

For the Department of the Public Health, the following persons have been appointed:

For the Department of the Public Education, the following persons have been appointed:

For the Department of the Public Works, the following persons have been appointed:

For the Department of the Public Safety, the following persons have been appointed:

For the Department of the Public Health, the following persons have been appointed:

For the Department of the Public Education, the following persons have been appointed:

For the Department of the Public Works, the following persons have been appointed:

For the Department of the Public Safety, the following persons have been appointed:

For the Department of the Public Health, the following persons have been appointed:

For the Department of the Public Education, the following persons have been appointed:

191/84

201

571 - 19973.

WALTER R. SWAN and WILBUR P.
COOPER, Administrators of the
estate of EUGENE E. SWAN, De-
ceased,

Appellees,

vs.

BOSTON STORE OF CHICAGO,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

121 I.A. 24

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$5,000 in favor of the appellee, hereinafter called the plaintiff, entered in the Circuit Court of Cook County, upon a verdict finding the appellant, hereinafter called the defendant, guilty of wrongfully causing the death of Eugene E. Swan, plaintiff's intestate, a boy five years old. This was the second trial of the case. On the first trial the plaintiff secured a judgment for \$10,000, and on appeal to this court this judgment was reversed and the cause remanded. (177 Ill. App. 349). The essential facts are not controverted. In fact, all the circumstances surrounding the accident are undisputed, save in one particular, that we will refer to hereafter. The defendant conducted a large department store in the City of Chicago, and on February 27, 1909, the mother of the said boy, a woman about fifty years old, accompanied by the boy and his two sisters, aged fourteen and nineteen years respectively, entered as passengers one of the defendant's elevators. The party entered the elevator on the ground floor, and all stood in the rear of the elevator facing the front of the same, and they informed the elevator man they wished to go to the photograph gallery. This gallery is on the eighth floor. The boy stood between the mother and one sister, and each of the latter two held one of his hands. The elevator stopped at the third floor and there let off passengers. It again started up and next stopped at the seventh floor, at

which place a mail man and a boy got off, and the Swans thinking that it was the photograph gallery floor, all started to get off the elevator. They moved towards the open door, and as they neared the same, the mother, who was a foot or six inches back of the boy, who ^{led} ~~presided~~ the party, released his hand, and the boy placed his right hand on the mother's arm. As he was in the act of leaving the elevator, and while he had one foot on the same and the other on the seventh floor, and while the door of the elevator shaft on this floor, that served the purpose of entrance and egress to the elevator, was open, the elevator boy suddenly started the elevator upwards, and the deceased was thrown under the elevator and down the shaft of the same, and he sustained injuries from which he immediately died. It is quite clear from the proof that as the elevator suddenly shot up, the boy, because of the position he occupied at that moment, was caused to swing under the elevator. The defendant insists that the boy stepped entirely from the elevator to the seventh floor, and that he then noticed that his family was not following him and that he then attempted to jump back onto the elevator; that, in the meantime, the operator had released the automatic mechanical device for closing the door and had started the car upwards, and that the child, in attempting to get back on the elevator, fell down the shaft before the elevator door was closed. We are unable to find any reasonable warrant in the evidence for the claim that the boy had entirely left the elevator and was attempting to get back on the same when the accident occurred. All of the witnesses in the case, who testified as to the position of the boy at the moment of the accident, place him in the position that we have heretofore stated in our recital of the facts of the case. The defendant bases its claim that the boy was attempting to get back on the elevator at the time of the accident upon a certain answer made by the witness Brownie S. Swan, one of the sisters of the boy. This witness, on the direct examin-

ation, had stated clearly and positively that when the elevator was started up, one of the boy's feet was on the elevator and the other on the seventh floor. On the cross-examination of this witness the following occurred:

"Q. And all took place within a second or two, isn't that the fact?

A. I expect it did.

Q. Your brother stepped out and the car started up; and the door started to close, and your brother jumped to get on the car, and the elevator man stopped the car, and all took place in a few seconds, didn't it?

A. Yes."

The last question is one that might very easily be misunderstood by a witness. The preceding question directs the attention of the witness to the element of time only; the second question is so framed that the witness is very apt to think that, while the cross-examiner has enumerated in it a number of supposed happenings, the final and only important query involved in the question is, did the entire occurrence take place in a few seconds? In our judgment, the answer to this last question, especially when it is considered in connection with the entire testimony of all the witnesses on the same subject, is not a sufficient basis for the claim now made by the defendant. We find that the abstract of the record makes it appear that the supposed facts enumerated in the question, were included in the answer of the witness instead of in the question of the cross-examiner.

The defendant first contends that the mother of the boy was present at the time of the accident and was guilty of negligence which proximately contributed to the injury, and that this fact precludes a recovery in this case. The defendant insists that the accident would have been avoided had the mother held the hand of the boy and directed his movements at the moment of the accident, and that her failure in this regard constituted contributory negligence that precludes a recovery in this case. "The rule is well settled in this state that in an action brought by the parents or personal representative, the negligence of a parent of a child of tender years which contributes to an injury resulting (in death) is imputable to the child, and if established, would prevent a re-

covery; and this is especially true where the parent is present with the child at the time of the injury, and the negligence consists of some act or omission on the part of the parent." Chicago & Alton R.R. Co. v. Logue, 158 Ill. 621. To the same effect are: Chicago City Ry. Co. v. Wilcox, 138 Ill. 370; City of Pekin v. McMahon, 154 Ill. 141; Ohnesorge v. Chicago City Ry. Co., 259 Ill. 42.

The question as to whether or not a person is in the exercise of ordinary care under given circumstances, is usually a question of fact for the jury to determine, and this rule is applicable to a case like the present where the mother is charged with negligence contributing to the injury of the child. Chicago & Alton R.R. Co. v. Logue, supra, 621-626. The facts surrounding the accident are clear and uncontroverted, and the present contention of the defendant is necessarily predicated upon the theory that no other conclusion can be reasonably drawn from the evidence than that the mother was guilty of negligence at the time of the accident that proximately contributed to the same.

"Passengers in an elevator must rely for their safety upon the efficient management of the conductor thereof. Their lives and safety are entrusted to his care, and he will be bound to the highest degree of care, skill and diligence practically consistent with the efficient use and operation of such conveyance. Nor is this duty intermittent, but it remains a constant duty owing to the passengers as long as they remain such. When the door was thrown open in such a way as to invite passengers to alight, it was not appellee's duty to stop, listen or make an examination before departing from the elevator. He had a right to assume that the appellant would perform its full duty toward him. (Tousey v. Roberts, 114 N. Y. 312; 21 N. E. Rep. 399.) And it was immaterial that he did not inform the elevator boy that he was about to alight. If the boy had been in the exercise of that degree of care imposed by the law upon him, the jury might well find, from the evidence, that he would have dis-

covered appellee in the act of alighting before the elevator was started in its descent. We have held that 'persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings.' (Hartford Deposit Co. v. Sollitt, 172 Ill. 222.) And in the case of Chicago West Division Railway Co. v. Mills, 105 Ill. 63, this court, speaking through Mr. Justice Schofield, said (p.37): 'It was of no consequence whether the car stopped at the instance of the plaintiff or not, since the act of stopping was productive of no injury, and is in no respect complained of. It is sufficient while the car was stopped parties were getting off, and the plaintiff, while attempting also to do so with due care, was injured by reason of the negligent starting of the car by the defendant's servants. Nor could it be material to determine whether plaintiff asked or obtained permission of the defendant or its servants to alight. The car being stopped from whatever cause, at a place where passengers were in the habit of alighting, she had the undoubted right to alight without making any request or obtaining any permission in that regard, and if the defendant's servants knew or by the exercise of due care would have known of it, it was negligence on their part to start the car before she had a reasonable time in which to alight.'" Chicago Exchange Building Co. v. Nelson, 197 Ill. 334.

We are quite clear, after a careful examination of the record in this case, that we cannot hold either as a conclusion of fact or as a matter of law that the mother of the boy was guilty of negligence that proximately contributed to the child's injury.

"There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impos-

sible to announce such a rule. The only requirement of the law is that the conduct of a person involved shall be consistent with what a man of ordinary prudence would do under like circumstances." Stack v. East St. Louis Ry. Co., 245 Ill. 308. This language applies with equal force to the conduct of the mother towards the child on the occasion in question. Under the rule laid down in Chicago Exchange Co. v. Nelson, supra, and under the circumstances surrounding her at the time of the accident and just prior thereto, the mother had the right to assume that the elevator man would not start the car while the boy and the other members of her family were alighting from the same. The jury have found that the mother was not guilty of negligence, and we approve this finding.

The defendant next contends that the elevator operator was not guilty of negligence that proximately contributed to the injury of the deceased. The defendant insists that the operator, in starting the car before the door was closed, was following a common custom in the loop district of Chicago to start an elevator as soon as the operator commenced to close the door of the same; and that, therefore, the operator of the car in question was not guilty of negligence in starting the car before the door was closed. We are unable to find any evidence in the record touching this alleged custom, but, even if the proof warranted the claim of such a custom, it would avail the defendant nothing in this case. The present somewhat daring contention of the defendant is absolutely devoid of merit. The proof clearly shows that the elevator operator was guilty of gross negligence at the time of the accident, and that this negligence caused the death of the boy.

The defendant next contends that verdict is excessive. We have carefully considered the evidence bearing upon this question, and we have reached the conclusion that we cannot say that the amount of the verdict is manifestly against the weight of the evidence.

The defendant next contends that the trial court should have granted the motion for a new trial, because a juror on his voir dire made incorrect and misleading answers. The juror in question stated on his voir dire that he had never been interested in the outcome of a case brought to recover damages for personal injuries; that he never had anything to do with a case of that kind; that he was once called as a witness before a coroner's inquest; that, at one time a man fell off the train of which he was the engineer, and that he was called as a witness in the damage suit that resulted; that the said case before the coroner occurred twenty years ago; that he never directly or indirectly had anything to do with personal injury cases. On the motion for a new trial an affidavit made by an attorney associated with one of the law firms representing the defendant was presented. This affidavit was to the effect that on February 5, 1913, the said attorney attended a coroner's inquest held over the bodies of Jeremiah P. O'Leary and Clarence B. Newell; that W. T. Davis, one of the jurors accepted to try this case, was present at the said inquest and with one J. H. Poague represented the estate and next of kin of said O'Leary; that it was stated at the inquest that said Poague was unfamiliar with the "technical question of a railroad interlocking device," and that thereupon the deputy coroner permitted said Davis to conduct the examination of various witnesses; "affiant further says that during the trial of the said cause he was in the court room and that he recognized the said W. T. Davis as the same person he had seen at the coroner's inquest;" that after the verdict was returned said attorney looked up the records in the said inquest and found that the said Davis appeared therein as above stated and that he thereupon advised Edward E. Everett of said facts. On the same motion an affidavit of said Everett was presented, in which it was recited that he was a member of one of the law firms representing the defendant, and that he had sole and complete charge of the

preparation and trial of this cause; ^{that} after the jury had retired to consider the verdict in the case, he was informed by the said Donovan, "one of my associates," concerning the matters and things stated in the affidavit of the said Donovan; that had the said Davis truthfully answered the ^{said} questions propounded to him by the affiant, affiant would have exercised a peremptory challenge as to the said Davis. From the affidavit of Donovan it does not appear that he did not recognize the juror Davis prior to the time the jury was sworn to try the issues in the case. If the said Donovan did recognize the juror Davis prior to the time that the jury was empanelled, the defendant would be in no position to raise the present contention, even though there was merit in the complaint. We fail to see, however, any evidence tending to show that the juror Davis was in the slightest degree prejudiced or biased against the defendant or interested in the result of the present suit. There is nothing in the affidavit of Donovan tending to show that a personal injury case was connected with or grew out of the death of the said O'Leary and Newell, or that the said Davis appeared at the said inquest on account of any interest he might have had in a personal injury case.

The defendant cites in support of his present contention, two Illinois cases: Vennum v. Marwood, 6 Ill. 359; West Chicago St. R.R. Co. v. Huhnke, 82 Ill. App. 404. In the first of these cases, the juror had formed and expressed a decided opinion on the merits of the case, adverse to the defendant, and this fact was not known to the party or his counsel at the time he was sworn to try the case. In the second case, it appeared that the foreman of the jury that tried the case stated, during the deliberation of the jury on their verdict, that he was prejudiced against the attorney for the appellant and that he "had it in" for said attorney and the juror, on his voir dire had stated that he had no prejudice against any of the



parties or counsel to the suit, and that he knew of no reason why he could not be a fair juror in the case. In our judgment the present contention of the defendant is without the slightest merit.

The defendant next contends that a number of remarks made by the counsel for the plaintiff in his argument to the jury were inflammatory and prejudicial. The first complaint is thus stated by the counsel for the defendant: "He insists, during the entire argument, that the verdict be \$10,000, and that it was not necessary to argue the question of the appellant's negligence. Then he accuses counsel for the appellant of using anything for an argument, for the purpose of diverting the jurors' attention from the real facts." Counsel has not called our attention to the specific part of the argument to which this general criticism is supposed to refer, and we are therefore unable to tell whether the counsel made proper and necessary objections to the parts of the argument they have in mind in this complaint. Peterson v. Pusey, 237 Ill. 204. It would certainly not be prejudicial error for the counsel for the plaintiff to tell the jury what, under the evidence, he considered a fair compensation for the injuries, and the fact that he placed the sum at \$10,000 would not be improper. Graham v. Mattoon City Ry. Co., 234 Ill. 453; Ledwell v. Chicago City Ry. Co., 160 Ill. App. 598. The defendant complains also of the following statement: "What was it the father said? He said: 'I have not read that record of the testimony. And I had it before me.' That is what he referred to. He did not read that testimony. I made suggestions, I asked what they remembered about the case, in my office. And he was right when he testified that he had not read it. I had it, and I refreshed his recollections from it." This statement by the counsel for the plaintiff was clearly improper. He had no right to give his version of what occurred in his office, but we fail to see how it could have possibly effected the result in this case. Mr. Swan, the father, (not a witness to the accident) testified that he talked

with the lawyer for the plaintiff about the case, and it is perfectly evident, from a reading of the testimony of the witnesses for the plaintiff, that the jury were informed that the said witnesses talked with the said lawyer and with each other about the case, and further, that they had either read, or had read to them, the testimony that had been given on the former trial of the case. The defendant does not complain that any of the witnesses gave testimony on this trial different from that given on the first trial. The defendant also complains of the italicized portion of the following statement: "Now, he says we come in here and ask for money. Yes, we do. That is all we can do. We cannot put the Boston Store out of business for this. We cannot take away its charter for running the elevators here the way that they ran this elevator. All we can do is to come and ask for money. Is that a reflection on the parties? That is what we are here for. Everett knows that. That is what he is paid for -- to defend and reduce the amount." It may be conceded that this sort of a statement by counsel for either side is not a proper method of argument, but it is one without force or sting and it is impossible to believe that it could have prejudiced the defendant with the jury. The defendant cites in support of his contention that the remark in question was prejudicial error the following cases: Chicago & Alton R.R. Co. v. Scott, 232 Ill. 419; Wabash R.R. Co. v. Billings, 212 Ill. 37; Chicago Union Traction Co. v. Lauth, 216 Ill. 173. The remarks complained of in these cases are of an entirely different character from the one now under consideration. The defendant next complains of the italicized part of the following statement: "When I say that I ask for ten thousand dollars, gentlemen, I do not ask it, as Mr. Everett says, because that is the limit that the law gives, that is not the reason; I ask it, because in this case Eugene was worth it; his estate would have been worth it; he would have saved a great deal

more than that. But, unfortunately, we cannot get more than that, because, as Everett says, that is the limit. I ask ^{that} of you, because Eugene, with his ability, with his physical proportions, with his brightness, with his intellectuality, could have earned that, could have made that." Counsel for the defendant made no objection of any kind to those remarks and he is therefore in no position to now complain of them. *Peterson v. Pusey, supra.* We have referred to all of the parts of the argument that have been complained of, and we are satisfied that none of them prejudiced the defendant.

The defendant has had two trials of this lawsuit, both resulting in verdicts against it, and we are unable to see how, under the facts of the case and the law applicable to the same, the defendant could reasonably expect to secure a verdict in its favor. No complaint is made as to the court's ruling in matters of evidence or in the giving or refusing of instructions, and from a careful study of this record, we are satisfied that the defendant has had a fair trial, and that the verdict is clearly right.

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

585 - 19993

THE PULLMAN COMPANY,
Appellee,
vs.
THE VINEGAR BEND LUMBER COM-
PANY, et al., on appeal of
VINEGAR BEND LUMBER CO.,
Appellant.

Appeal from
Superior Court,
Cook County.

191 I.A. 3

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Vinegar Bend Lumber Company from a decree requiring it and other defendants in an interpleader suit to interplead. To the original bill appellant filed a sworn answer and served notice thereof on complainant, the appellee, and no replication thereto was filed. Later appellee, on leave given, filed its amended bill of complaint waiving answers under oath and issues were formed thereon by the filing of answers and replications, appellant not waiving any rights under said sworn answer. Later a supplemental bill was filed, setting up among other things a stipulation of the parties entered into after the original bill was filed, and answers thereto and replications were duly filed.

The pleadings show that appellee was indebted in the sum of \$1234.56 for lumber which both appellant and one Joice claimed to have sold to it, that Joice assigned his interest in the money to the Old Colony Trust & Savings Bank; that the latter brought suit therefor against appellee in the name of Joice; that one Brooks, a creditor of appellant, summoned appellee as garnishee in an attachment suit against appellant, in which Joice and said bank intervened as claimants of the money, and in which was later filed the stipulation in question, by which the several parties named agreed that all, except Brooks, would enter appearance in this interpleader suit, and that the matters thus put in issue in the garnishment suit should be



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tried in this proceeding, and that the decree of the court should be "final and binding upon all parties" thereto so far as the litigation in the garnishment proceeding was concerned, not barring, however, the right of appeal therefrom; and that the further hearing of the garnishment suit should be postponed until the final decree in the interpleader suit, Brooks binding himself also to be bound thereby.

The case was heard upon a modified order setting the cause for hearing upon the bill of complaint, the answer of appellant thereto, the amended and supplemental bills of complaint, the answers thereto, the replications to the last mentioned answers, and upon proofs. The only proofs adduced were by appellee, consisting of a transcript of the record of the proceedings in the attachment suit, and the answer of appellee as garnishee therein to the intervening petitions of said bank and said Joice, which sufficiently showed the several claims as aforesaid and the essential conditions for a decree of interpleader.

Appellant, however, objected to such evidence, claiming that under section 22 of the Chancery Practice Act, its sworn answer must be taken as true and that such evidence did not contradict it, and now claims that there was no competent evidence to support the decree. At the close of the case, appellant also moved to dismiss the several bills for want of equity, but the motion was denied and the decree now appealed from was entered, requiring that defendants interplead, and that complainant deposit the sum in controversy with the clerk of the court and be discharged from all claims, etc.

As to the effect of its sworn answer, appellant cites Stevenson v. Mathers, 57 Ill. 123, and Wylde v. Crane, 53 Id. 490, holding that a party cannot file a bill that calls for and receives an answer under oath and evade the effect of the answer there responsive by filing an amended bill saving answer under oath, but otherwise substantially the same as the original bill. We do not

think this rule, however, can be invoked in the present instance,- first, because appellant practically consented to a decree of interpleader in the stipulation aforesaid, and, secondly, because the matters set up in said sworn answer were insufficient to bar the relief prayed for.

The stipulation above referred to was entered into the day after the filing of the original bill and before answer thereto. It contemplated that the identical thing at issue in the garnishment suit, namely, title to the fund in question, should be submitted for adjudication through interpleading between the several claimants in the interpleader suit, and that there should be a final decree therein binding on all parties except as to the right of appeal. In effect each party waived any question as to the sufficiency of the bill, and consented to interplead and have the several claims considered, and finally adjusted. We do not think that appellant should now be permitted to resort to technical procedure to defeat the ends it voluntarily consented to.

But, conceding for the sake of argument that the rule as to a sworn answer not replied to may be invoked in an interpleader suit,- although in such a proceeding it is recognized that "complainant's office is widely different from that of the ordinary complainant in a suit of equity seeking to avoid a liability or to enforce some right against the defendant," (Palches v. Crawford, 1 Sandf. Ch. 380) and that the answers of defendants may be read against one another, (Morrill v. Manhattan Life Ins. Co., 182 Ill. 280); and disregarding whether the general rule that an amended bill supplants the original bill is not applicable, (Bredish v. Grant, 119 Ill. 606; Bonney v. Lamb, 210 Id. 95) still, we do not think the facts set up in the sworn answer constituted a bar.

The evident purpose of the answer was to show that there was an independent liability of appellee to appellant. It alleged that appellee gave appellant a written order for the lumber,

that appellant subsequently shipped the lumber to appellee and that the latter knew it was purchasing the lumber from appellant and credited the said sum to appellant's account on its books. But these allegations were mostly conclusions, or statements of uncontrolling evidentiary facts. The answer did not set up facts showing such contractual relations between appellant and appellee as were binding on the latter as upon an independent undertaking without reference to its possible liability to Joyce, the other claimant. (Platts Valley Bank v. National Bank, 139 Ill. 280; 4 Pomeroy Eq. Juris., Sec. 1336.) It clearly appeared from the original bill, before it was amended, that the debt or fund due was claimed by the several defendants, that complainant was not interested in it, and that it emanated from a common source. It was unnecessary that it set forth in detail the alleged title of defendants (Byers v. Sanson-Thayer Coal Co., 111 Ill. App. 575), and there was nothing in the pleadings that warranted a hearing on the question of independent liability to any one of them.

The contention that the bill lacked elements essential to the equitable remedy of interpleader is not well taken. It showed that the same fund, namely, the money due for the lumber, was claimed by all the parties against whom the bill demanded relief; that it had a common source in the lumber or sale thereof; that complainant was not interested therein and was indifferent among the claimants, and practically a disclaimer of independent liability to any one of them.

It is also urged that the court improperly sustained a surrer to appellant's amended cross-bill. It is enough to say that one is unnecessary for the assertion and adjustment of the claim of one thus interpleading. The answer was sufficient for that purpose. (Lawrence v. Paden, et al., 76 Ill. App. 512.)

The decree will be affirmed.

AFFIRMED.

WILLIAM SUMNER SMITH,
Defendant in Error,

vs.

HARRY ROSENWASSER and MORRIS
ROSENWASSER, co-partners as
ROSENWASSER BROTHERS,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

191 I.A. 25

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 21, 1912, the plaintiff, Smith, commenced an attachment suit in the Municipal Court of Chicago against Rosenwasser Brothers, manufacturers and jobbers of sandals, etc., in New York City, claiming that they owed him the sum of \$156.26, and Tucker & Hagen, a corporation, was served as garnishee. Subsequently the defendants appeared and entered into a recognizance, whereupon the attachment was released and the garnishee discharged. In his amended statement of claim plaintiff alleged that his said claim was for "loss of commissions" for the sale of certain sandals, "which plaintiff bought from the defendant and which defendants failed and refused to deliver, and plaintiff claims the usual and customary charge or profit on the sale of said goods, being unable to secure them elsewhere on the market at the time defendants refused to deliver same, as per contracts dated July 27, 1911, and October 21, 1911, respectively"; that the price for which defendants agreed to deliver said sandals was \$784.80, and that plaintiff was damaged to the extent of 30% of said \$784.80, or \$156.26. In defendants' affidavit of merits it was alleged that defendants were not indebted to plaintiff in any sum, and that plaintiff was not damaged on account of loss of profits. The case was tried before the court without a jury, resulting in a finding and judgment, November 14, 1912, against defendants for \$156.26, which judgment it is sought by this writ



The following is a list of the names of the persons who have been named in the above account.

1. *John Smith*, of the County of ... State of ...
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 3. *William Jones*, of the County of ... State of ...
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 99. *John Clark*, of the County of ... State of ...
 100. *James Evans*, of the County of ... State of ...

to reverse.

The following facts are disclosed from the evidence: On July 27, 1911, and on October 19, 1911, respectively, plaintiff gave to a salesman of the defendants in Chicago two written orders for certain sandals, manufactured by defendants, at the price of \$784.20, to be delivered to plaintiff at Chicago on January 1, 1912, and to be paid for by plaintiff on June 1, 1912. The said orders were accepted by defendants. Plaintiff testified that subsequently, and before December 1, 1911, he made contracts to sell said sandals, at an advance of 30% over the purchase price, to Carson, Pirie, Scott & Co., of Chicago, and to "eight or ten parties in Detroit," but it does not appear when said sandals, under said contracts, were to be delivered to said Carson, Pirie, Scott & Co. or to said other Detroit parties. On December 14, 1911, defendants at New York wrote plaintiff at Chicago, requesting plaintiff to give them a statement of his affairs, and on December 24, 1911, defendants again wrote plaintiff, saying that they had been unable to obtain a satisfactory statement as to plaintiff's affairs from the mercantile agencies, and requesting plaintiff to send forward such a statement, "so that we may be able to adjust your credit and send your order through the factory, if same will be satisfactory to us." On January 6, 1912, defendants again wrote plaintiff, expressing regret that they would be unable to extend credit to plaintiff, and further saying: "We would be pleased to sell you goods, either for cash or if you will get somebody to guarantee the account for you. Please let us hear from you so that we may proceed with your order or cancel same." On February 14, and April 19, 1912, defendants wrote plaintiff letters to the same effect. On June 3, 1912, plaintiff wrote defendants demanding that they pay him his damages for their failure to deliver said sandals on January 1, 1912, and subsequently, on June 21, 1912, plaintiff commenced this suit by attachment, as aforesaid.

Plaintiff further testified that after he received defendants' letter of January 6, 1912, he made an effort to buy sandals of one other New York concern in order to obtain the same for delivery to his customers, Carson, Pirie, Scott & Co. and said other Detroit parties, but that the sandals of said concern "did not grade up" with those of defendants, which he had contracted to sell to his said customers; that he made only one inquiry to obtain the goods in the New York market, and that he made no effort whatever to obtain them in the Chicago market. Three witnesses for defendants testified to the effect that five other New York concerns, during January and February, 1912, manufactured and sold sandals identical in material and pattern with those manufactured by defendants, and for the same price as defendants' price, which was the market price; that said sandals were easily obtainable as the supply exceeded the demand, and that there was no advance in the market price of said sandals after January 1, 1912, and until July 1, 1912. And the evidence offered by plaintiff tended to show that he could have obtained said sandals from defendants at said price, at any time after January 1, 1912, and until he commenced this suit, for cash, or by having some responsible party guarantee his account.

We are of the opinion that the trial court erred in entering the judgment. While it may be true that defendants breached the contracts of July 27 and October 19, 1911, whereby they agreed to deliver the sandals to plaintiff at Chicago on January 1, 1912, on credit, viz.: at the price of \$784.80, to be paid for by plaintiff on June 1, 1912, still we think that, under the facts of this case, plaintiff was entitled to recover only nominal damages. (Deere v. Lewis, 51 Ill. 254, 298.) It clearly appears that, when plaintiff was notified by defendants that they would not deliver the sandals to him unless he would pay cash or get somebody to guarantee his account, he could either have pro-

secured the sandals from defendants, for delivery to his alleged customers, by complying with defendants' demands, or he could have procured for said customers sandals, identical in material and pattern with those manufactured by defendants and at the same price, from several other New York concerns. By doing either he could have made his profit, as claimed, of 30% on said price, and thereby have reduced his alleged damages to a minimum. It was his duty to mitigate the damage, but it seemingly appears that he refused to buy the sandals of defendants for cash or to procure a guarantor of his account, and that he did not make a very earnest attempt to purchase similar sandals of other concerns at the market price for cash, which it further appears he could easily have done. In an action for a breach of contract in failing to deliver chattels or other commodities, where the purchase price has not been paid, the measure of damages is the difference between the contract price and the market value of the property at the time stipulated for their delivery. (Deere v. Lewis, 51 Ill. 264, 267; Gleuter v. Fallbaum, 43 Ill. 43, 45; Smith v. Dunlap, 12 Ill. 164, 161.) We think it clear that in this case plaintiff was not entitled, as damages, to the whole amount of the alleged profit he expected to make from a re-sale of the sandals, purchased from defendants, to his alleged customers. It appears that the market price of the sandals on January 1, 1913, and subsequently, was the same as the price at which he had contracted to purchase them from the defendants.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

J. M. HOYT,
Defendant in Error,

vs.

EARL J. WALKER,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

191 I.A. 105

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 28, 1912, J. M. Hoyt commenced an action of the fourth class in the Municipal Court of Chicago against Earl J. Walker to recover of him, as endorser, the balance due on the following promissory note:

"Chicago, Nov. 1st, 1911.

On demand after date we promise to pay to the order of J. M. Hoyt (\$1000) one thousand and no/100 dollars, payable at _____, value received with interest at the rate of 6 per cent per annum. Four days notice agreed upon.

Industrial & Historical Pageant Corporation
By Laurence Clark, Pres."

On the back of the note there were the following signatures: "Laurence Clark," "H. H. Hoyt Jr.," "Earl J. Walker," and below said signatures, the following endorsement: "Jan 11/12, \$120 paid on principle, J. M. H." The cause was tried before the court without a jury, resulting in the court finding the issues against the defendant and assessing plaintiff's damages at \$988.25. Judgment against defendant was entered on the finding, which judgment it is sought by this writ of error to reverse.

The facts as disclosed from the evidence are, substantially, as follows: On November 1, 1911, the Industrial & Historical Pageant Corporation, hereinafter called the Company, being indebted to plaintiff for money loaned, executed the said note. Laurence Clark, H. H. Hoyt, Jr., and defendant were then, respectively, the president, acting treasurer, and secretary of the Company. As the Company was then in bad financial condition plaintiff



The following table shows the results of the survey conducted in 1960. The data is presented in two columns: 'Year' and 'Value'. The values are in thousands of dollars.

Year	Value
1950-1955	100
1955-1960	200
1960-1965	300

The following table shows the results of the survey conducted in 1965. The data is presented in two columns: 'Year' and 'Value'. The values are in thousands of dollars.

Year	Value
1950-1955	150
1955-1960	250
1960-1965	350

The following table shows the results of the survey conducted in 1970. The data is presented in two columns: 'Year' and 'Value'. The values are in thousands of dollars.

Year	Value
1950-1955	200
1955-1960	300
1960-1965	400

The following table shows the results of the survey conducted in 1975. The data is presented in two columns: 'Year' and 'Value'. The values are in thousands of dollars.

Year	Value
1950-1955	250
1955-1960	350
1960-1965	450

demanding that the note be endorsed by the officers of the Company in their individual capacities. Accordingly Clark signed the note as president of the Company and personally endorsed it, as did H. H. Hoyt, Jr. In this condition the note was tendered to plaintiff who refused to accept it, and who insisted that the note be also endorsed by defendant. Hoyt, Jr., and Clark then took the note over to defendant, explained the situation to him, and defendant finally endorsed the note, and the same was delivered to plaintiff who then accepted it. The words on the face of the note, "Four days notice agreed upon," were written in ink by Clark. The evidence is conflicting as to whether or not those words were on the note when the same was delivered to defendant for his endorsement, but we think it was shown by a preponderance of the evidence that said words were on the note when Hoyt, Jr., endorsed the note and also when defendant endorsed it.

Eugene L. Garey, an agent of plaintiff, testified substantially that on the "Wednesday after Thanksgiving, 1911," (which was December 8, 1911) at plaintiff's request, he went to the office of the Company in the First National Bank Building, Chicago, for the purpose of notifying the Company of plaintiff's intention to demand payment of the note in four days, but that he found the Company's office closed; that he then went to the office of defendant in the Strauss Building, Chicago, saw him and made a demand that said note be paid in four days; that defendant told him that the Company was bankrupt and out of business and that Clark had a new office in the Peoples' Gas Building, and requested him (Garey) to bring him (defendant) a copy of said note on the following Saturday morning; that during the course of the conversation defendant said: "If Hoyt will be decent about this matter, he will get his money on it, but I want time to take it up with Howard Hoyt, Jr., and Clark and see what they are going to do about it"; that he (Garey) on said Wednesday went to Clark's new office, saw Clark, and made a demand that the note be paid; that Clark

said that the Company had no money and that he, personally, was not in a position to take up the note; that on the following Saturday morning he (Garey) again went to defendant's office and gave him a copy of the note; that on the following Monday morning he (Garey) again saw Defendant at his office and demanded of defendant that he, personally, pay the note; and that defendant replied that he has not yet seen Howard Hoyt, Jr., or Clark, and would not pay the note then, but that "if Hoyt will just be decent and give us time about paying it, he will get his money." The defendant denied that either Garey or anyone ever made any demand on him to pay the note, and denied having the conversations with Garey as testified by the latter. On January 2, 1912, the defendant wrote plaintiff: "I am enclosing my check for \$120, + +. This payment is made by me on behalf of the Industrial Historical Pageant Corporation account, which please credit." Plaintiff received the money and made the endorsement on the note, "\$120 paid on principle." After making various unsuccessful attempts to secure the balance due on the note plaintiff commenced the present suit.

Counsel for defendant here contend that the finding and judgment are against the weight of the evidence, in that (1) it was not sufficiently shown that a proper presentment and demand for payment of the note were made on the maker, and (2) that it was not sufficiently shown that notice of the dishonor of the note was given to the defendant, one of the endorsers, and (3) that the note was materially altered without defendant's consent by the addition of the words, "Four days notice agreed upon," after defendant's endorsement was placed on the note. Without following counsel in their very elaborate arguments on these points, we deem it sufficient to say that after careful consideration we have reached a contrary conclusion, and are of the opinion that the finding and judgment are amply supported by the evidence.

On the trial, at the conclusion of the evidence, the defendant submitted to the court 15 written propositions to be held

as law in the decision of the case, upon some of which the court wrote "held" and upon others "refused." It is here contended that the court erred in refusing the propositions, numbered 7, 11, 13 and 15. We are of the opinion that no error prejudicial to the defendant was committed by the court in refusing said propositions.

The judgment of the Municipal Court is affirmed, and the costs for the printing of the supplemental abstract of the record filed in this court by plaintiff will be taxed against defendant.

AFFIRMED.

WARREN E. COLBURN and FLETCHER
A. TINKHAM, doing business as
W. E. Colburn & Co. and carry-
ing on the Merchants Exchange
Bank,

Defendants in Error,

vs.

COMMERCIAL SECURITY COMPANY,
a corporation,

Plaintiff in Error.

Error to

Municipal Court

of Chicago.

191 I.A. 106

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

On March 18, 1913, plaintiffs commenced an action in tort in the Municipal Court of Chicago to recover \$120 of the defendant, and also to recover other amounts aggregating the sum of \$45. The cause was tried before the court without a jury. At the conclusion of the hearing the court announced that the plaintiffs were not entitled to recover any of said amounts aggregating \$45, but as to said amount of \$120 the court found the defendant guilty as charged in plaintiffs' statement of claim, and assessed plaintiffs' damages at \$120 in tort. Judgment was entered upon finding, which judgment the defendant by this writ of error seeks to reverse.

The portion of plaintiffs' amended statement of claim, relative to said item of \$120, is as follows:

"Plaintiffs' claim as amended is for money collected by the defendant, with notice of the plaintiffs' right thereto, upon a conditional contract of sale by Charles F. Dickinson to Mons M. Strader of a piano sold by Haines Bros., number 40084, to be paid for in monthly installments of \$10 each, which piano said Dickinson had previously sold to Cora F. Leslie and had reclaimed the same for non-payment by said Leslie, and the conditional contract of sale to said Leslie had been assigned to and pledged to the plaintiffs, together with an agreement by said Dickinson to assign to and place with the plaintiffs any subsequent contract of sale of said piano, if it should be reclaimed, as security for the payment to plaintiffs of money loaned by them to said Dickinson, which money was collected before September 7th, 1908, when demand for possession of said contract was

said in plaintiffs' behalf upon defendant, and, upon defendant's refusal to surrender the same, suit in replevin against it was brought and judgment obtained for the amount uncollected upon said fireder contract at the time said demand for it was made, \$130."

In order to better understand the present case reference is hereby made to the opinion of branch "D" of this court in the case of Colburn v. Commercial Security Co., 172 Ill. App. 310, in which case the parties plaintiff and defendant were the same as in the present case.

In the present case, that portion of defendant's affidavit of merits, relative to said item of \$130, is as follows:

"That on to wit, the 28th day of March, A. D. 1910, the plaintiffs filed in the Municipal Court of Chicago an affidavit in replevin for the contract covering the piano in question (which said suit was numbered 28849), which said affidavit in replevin set out that the plaintiffs were entitled to the possession of the contract in question, and that the defendant herein and therein, Commercial Security Company, a corporation, unlawfully withheld same from the plaintiffs; that thereupon, a writ of replevin issued out of the clerk's office of said Municipal Court of Chicago, was duly endorsed and delivered to the bailiff of said court, and afterwards returned by said bailiff with an endorsement showing that the plaintiffs having given security as per bond filed with the said bailiff, the said bailiff had executed the within writ by making personal service thereof upon the defendant, Commercial Security Company, and demanded that said Commercial Security Company turn out the property described therein, being the contract in question, which said Commercial Security Company refused to do, and that being unable to find said property, said bailiff returned said writ not executed as to said property on, to-wit, the 4th day of April, A. D. 1910; that thereupon the plaintiffs elected to proceed in trover for the value of said contract, and afterwards, to wit, issue having been joined in trover, on the 7th day of April, A. D. 1910, said cause was submitted to the court and a jury, and a verdict by the jury returned for two hundred fifty-five dollars (\$255), and afterwards, to wit, on the 7th day of May, A. D. 1910, judgment was entered on said verdict for two hundred fifty-five dollars (\$255) and costs of suit; that afterwards, to wit, on the 1st day of June, A. D. 1910, a writ of error was filed in said Municipal Court to the Appellate Court of Illinois, for the first district of Illinois, and afterwards, to wit, at the October term, A. D. 1912, of said Appellate Court of Illinois, said judgment was affirmed, and afterwards to wit, on the 10th day of November, A. D. 1912, this defendant paid and satisfied said judgment in full in said Municipal Court, together with the costs of suit, and also paid and satisfied in full the costs of suit in said Appellate Court of Illinois; that in and by proceeding in trover in said cause in said Municipal Court of Chicago, said plaintiffs elected to determine their remedy and the value of said contract, and thereby did determine and elect to sue for the then value of said contract; that said

sum of one hundred twenty dollars (\$120) is money collected upon the said contract, and the plaintiffs are entitled for the reasons aforesaid to set up any claim thereto."

At the trial no witnesses testified on behalf of either party as to said item of \$120, although several witnesses, called by plaintiffs and defendant, gave testimony regarding the items aggregating \$45, which items are not now in question.

Counsel for defendant contends that, as there was no evidence introduced as to said item of \$120, the judgment, which is based on said item, cannot stand for lack of evidence to support it. Counsel for plaintiffs replies that the admissions, as contained in defendant's affidavit of merits and as made by defendant's counsel on the trial, sufficiently support the finding and judgment.

In plaintiffs' statement of claim it is alleged that: the \$120 item was money collected by the defendant "before September 7th, 1909, when demand for possession of said contract was made," and that, when defendant refused to surrender the contract, plaintiffs brought the former replevin suit for the contract and judgment was obtained in said suit for "the amount uncollated upon said * * * contract at the time said demand for it was made." In the affidavit of merits it is alleged that on March 23, 1910, plaintiffs commenced the former replevin suit to obtain the possession of the contract; that upon the bailiff asking his return on the replevin writ to the effect that upon his demand the defendant had refused to turn over the contract, plaintiffs "elected to proceed in trover"; that in said former suit issue was joined in trover and judgment in favor of the plaintiffs, in the sum of \$265, was afterwards obtained therein, and that said judgment was afterwards paid and satisfied in full; that in and by said proceeding in trover plaintiffs elected "to sue for the then value of said contract; that said sum of \$120 is money collected upon the said contract, and that the plaintiffs are entitled for the reasons aforesaid

said to set up any claim thereto." It will be noticed that the defendant in this affidavit in effect admits that the \$120 sued for was collected by defendant before plaintiffs made their demand upon defendant to surrender the possession of said contract, and that after said \$120 had been collected by defendant, plaintiffs elected to sue in trover for the then value of said contract and obtained judgment for the amount of that value, which judgment was paid. It is manifest that the value of the contract at the time of the commencement of the replevin suit had been lessened to the extent of the \$120 payment made thereon to the defendant, and that the judgment obtained by plaintiffs in trover for the said "then value" of the contract would not include said previous payment of \$120 to defendant. It will also be noticed that defendant in said affidavit of merits does not allege that said \$120 had been received by plaintiffs or that it was included in said judgment. The issue made by the affidavit is, we think, solely one of law, namely, that under the facts plaintiffs are precluded from making a claim to said item of \$120. That this was the theory of the defense as to said item of \$120 in the trial court is evidenced by the following colloquy, which occurred early in the trial and before evidence was heard on said items aggregating the sum of \$45:

"The Court: Then you agree on the facts here?"

Mr. Matthews (Attorney for plaintiffs): Not on the \$45.

Mr. Booz (Attorney for defendant): On the \$120, the facts are set up in that - - -

The Court: As I understand it, there were some payments collected before - - -

Mr. Matthews: Demand was made for the contract.

The Court: Yes.

Mr. Booz: Then the replevin suit was brought, but they did not secure anything that was paid on the contract in the defendant.

The Court: Before suit was brought?

Mr. Matthews: That is it, before demand was made. No

got a judgment when it was thrown into trover; we got a judgment for the amount of the contract.

Mr. Booz: The value of the contract at the time of the demand.

Mr. Matthews: Yes, that is it.

The Court: Will you put on your witnesses to prove that?

Mr. Matthews: That is admitted.

The Court: How much is it?

Mr. Matthews: It is \$120.

The Court: Collected before that? Is that admitted?

Mr. Matthews: Yes, sir. He does not deny the \$120; he denies the legal liability.

anything Mr. Booz: I deny the legal liability. I am not admitting/except what is admitted in the pleadings.

Mr. Matthews: There is \$120 which he does not deny in his affidavit of merits.

The Court: Is that all there is to the case?

Mr. Matthews: No; that is all there is to that part of it. There is \$6 collected on the Stone contract. (And other items aggregating \$45) They deny that they got the money.

Mr. Booz: Yes; we do deny it."

At the conclusion of the hearing of the evidence as to said items aggregating \$45, and immediately preceding the entry of the formal finding and judgment, the following occurred:

Mr. Matthews: We made a demand for the money sued for, and I will introduce it in evidence unless Mr. Booz admits it.

Mr. Booz: I admit a demand was made prior to the beginning of this suit.

The Court: It seems to me the plaintiffs are entitled to recover here on the amounts collected on that particular contract. I think the plaintiffs are not entitled to recover on any of the others.

Mr. Booz: In other words, you find for the \$120?

We are of the opinion, in view of the allegations of plaintiffs' statement of claim, that the admissions made by the defendant in its affidavit of merits, taken in connection with the admissions made by counsel for defendant in open court, are sufficient to support the finding and judgment.

And we do not think there is any substantial merit in the contention of counsel that under the facts plaintiffs are estopped from now making a claim to said sum of \$120. As we understand the position of counsel it is that only one action in tort could be brought, that plaintiffs commenced the action in replevin for the possession of the contract and afterwards elected to proceed in trover for the then value of the contract, when they should also have included in said trover action the amount previously received by defendant on said contract, and that by such election plaintiffs' right to sue in tort for said \$120 as previously collected is now gone. When plaintiffs commenced their action in replevin to recover the possession of the contract they could not also have successfully maintained replevin for the unmarked and undesignated money, to the amount of \$120, previously paid to defendant on said contract. (Cobbey on Replevin, 1st ed., sec. 72; Loy v. Martin, 18 Ill. 226, 232.) Had plaintiffs received the contract under the replevin writ and successfully maintained their right to the possession of the same in the replevin suit, we think they would afterwards have had a separate right of action for the recovery from defendant of said \$120 previously paid to defendant. On account of the refusal of defendant to turn over the contract plaintiffs elected to proceed in trover for the then value of the contract, and we think under the facts of this case such separate right of action still existed when plaintiffs commenced the present suit. (McDole v. McDole, 106 Ill. 452; Dulaney v. Payne, 161 Ill. 325, 330.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

LISA WALPER, JOHN WALPER and
RUDOLPH WALPER, heirs of
Jacob Walper, deceased,
Plaintiffs in Error,
vs.
ANDREW WALKIEWICZ,
Defendant in Error.

Error to
Municipal Court
of Chicago.

191 I.A. 108

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On July 2, 1913, plaintiffs commenced an action of the fourth class in the Municipal Court of Chicago against Andrew Walkewicz, defendant. The action was based upon a written lease. The case was tried before the court without a jury resulting in a finding and judgment in favor of defendant, which judgment it is sought by this writ of error to reverse.

It was alleged in plaintiffs' statement of claim, in substance, that the defendant, by a written lease dated October 31, 1909, leased from the plaintiffs, heirs of Jacob Walper, deceased, a certain dwelling house, known as No. 139 East 107th street, Chicago, Illinois, for the term of three years, commencing on December 1, 1909, and ending on November 30, 1912, at a total rental of \$936, payable monthly in advance at the rate of \$78 per month, which said sum the defendant in said lease agreed to pay; that the defendant on said December 1, 1909, entered upon said premises and occupied the same until on or immediately before April 1, 1912, when he moved out; that eight months' rent, amounting to \$608, has become due plaintiffs under said lease, which sum defendant upon demand has refused and does refuse to pay; and that plaintiffs never released defendant from liability for the balance of the term of said lease. Attached to said statement of claim and made a part thereof was a copy of said lease, signed by the defendant and also signed "Jacob Walper, by John Walper." The

statement of claim was supported by the affidavit of an agent of plaintiffs in which it was alleged that plaintiffs' demand was for money due plaintiffs on said lease and that the amount due was \$808.

In defendant's affidavit of merits it was alleged that defendant had a complete defense to the whole of plaintiffs' claim, in that (1) "the lease sued on was cancelled at the time the premises were vacated by defendant"; (2) "the plaintiff accepted the premises and took possession of the same and made alterations and repairs," and (3) "said lease was terminated by mutual agreement made by Jacob Walper during his lifetime and the defendant herein." It will be noticed that the defendant did not deny the execution by him of the written lease sued on, and did not allege that said lease was not a valid lease.

From the stenographic report of the proceedings on the trial, certified by the trial judge as correct, it appears that John Walper, one of the plaintiffs, testified in substance that he personally saw the defendant sign the lease in question; that the defendant lived on the premises for two years and four months; that during all that time he paid his rent; that he left the premises and ceased to pay rent therefor about April 1, 1910; and that there is now due from defendant as rent the sum of \$808, for eight months' rent at \$80 per month. The plaintiffs then offered in evidence the original lease, and the same was admitted, the attorney for defendant stating at the time that he had no objection to its being received in evidence. The plaintiffs thereupon rested their case. The defendant then called as a witness said John Walper and examined him under the provisions of section 33 of the Municipal Court Act. He testified in substance, in response to questions asked of him by the attorney for defendant and also by the court, that after defendant left the premises he made certain repairs thereon; that he also moved a toilet from the outside into the house and put a bath-room in the house; that he put the property

the same as the one which was used in the first edition of the book. The only change made was in the title, which was changed from "The History of the County of Kent" to "The History of the County of Kent, from the Earliest to the Present Time".

The book is divided into two parts. The first part contains a general history of the county, and the second part contains a detailed history of the various parishes and towns. The first part is divided into three sections: the first section contains a general history of the county, the second section contains a history of the county from the time of the Romans to the time of the Normans, and the third section contains a history of the county from the time of the Normans to the present time. The second part is divided into two sections: the first section contains a detailed history of the various parishes and towns, and the second section contains a detailed history of the various parishes and towns.

The book is written in a clear and concise style, and is well illustrated with numerous maps and drawings. It is a valuable work for anyone interested in the history of the county of Kent, and is a must-read for anyone who lives in the county. The book is available in paperback and hardcover editions, and is priced at £12.95. It is published by the Kent County Council, and is available from all good bookshops.

into the hands of a real estate agent for the purpose of endeavoring to rent the same; and that he did not accept the key to the premises from the defendant. The court stated that, in his opinion, the fact that said repairs were made by plaintiffs after defendant moved out "would in itself be considered as an acceptance of the premises and a surrender." In this ruling we think the court erred. (West Side Auction Co. v. Connecticut Ins. Co., 100 Ill. 160, 161; Marshall v. Grosse Clothing Co., 184 Ill. 431, 434; Guinee v. McAdam, 79 Ill. App. 201; Brauchmann v. Twibill, 88 Pa. St. 58.)

During his examination under said section 33, John Walper further testified that his father, said Jacob Walper, died some time during the year 1905 and prior to the time said lease was entered into. Thereupon the attorney for defendant moved for a judgment for defendant upon the ground that it appeared that at the time the lease was entered into the party named as lessor therein was dead. The court stated that in his opinion there was no such lease as was required by the Statute of Frauds. The attorney for plaintiffs argued that there was at least a sufficient memorandum signed by the party to be charged to hold defendant, and further that the objection just made was not made as issue by the pleadings, in that defendant in his affidavit of verity did not question the validity of the lease but only alleged that the lease was terminated and cancelled when defendant moved out, and that the sole issue raised was whether or not said lease had been cancelled, when defendant moved out, either by express agreement or impliedly by the acts of plaintiffs.

There is contained in said stenographic report a pamphlet containing the rules of said Municipal Court, which rules are certified by the trial judge as being the rules in force at the time this cause was tried and the judgment entered. Rule 17 is to the effect that, in cases of the fourth class for the recovery of money

only, the defendant in his affidavit of merits shall specify the nature of his defense "in such a manner as to reasonably inform the plaintiff of the defense which will be interposed at the trial, and evidence of only such defenses as are set out in said affidavit shall be admitted on the trial." Rule 19 is to the effect that every allegation of fact in plaintiff's statement of claim, "if not denied specifically or by necessary implication in the affidavit of defense filed in reply * * , shall be taken to be admitted except as against an infant or a lunatic."

We are of the opinion that the court erred in entering the judgment in favor of the defendant. We think that under the pleadings and under the evidence the court should have found the issues for the plaintiffs and assessed their damages at the sum of \$308, and entered judgment for that amount against the defendant. The evidence shows that defendant signed a written lease of the premises, in which he agreed to pay as rent for the same, from December 1, 1909, to November 30, 1911, the total sum of \$308, that he occupied said premises and paid rent therefor under said lease for two years and four months, that about April 1, 1910, he moved out and ceased to pay rent, and that he did not pay any rent for the eight months remaining of the term, which by said lease amounts to \$308. The only defense stated in defendant's affidavit of merits was that on said April 1, 1910, the lease was cancelled, either by express agreement between the parties or impliedly. The evidence does not establish that defense, or that defendant was in any manner released from his obligation to pay the stipulated rent.

The judgment of the Municipal Court is reversed, and judgment will be entered here in favor of plaintiffs and against Andrew Walkewicz, defendant, in the sum of \$308.

REVERSED AND JUDGMENT HERE.

FINDING OF FACTS. We find that the defendant, Andrew Melkewicz, by written lease signed by him agreed to pay rent for the premises for three years ending November 30, 1912, at the rate of \$36 per month, that he occupied said premises until about April 1, 1913, when he moved out of the same, that the lease was not cancelled, that he paid nothing on the rent from April 1, 1913, to November 30, 1913, and that he owes plaintiffs on said lease the sum of \$206.



CONFIDENTIAL

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JAMES HOLEC and FRANK HOLEC,
copartners, doing business
as HOLEC BROS.,

Plaintiffs in Error,

vs.

KATE BERANEK,

Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 116

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

James Holec and Frank Holec, doing business as Holec Brothers, plaintiffs in error, hereinafter called plaintiffs, brought an action against Kate Beranek, defendant in error, hereinafter called defendant, to recover \$486.87 in the Municipal Court of Chicago. The case was tried before the court without a jury, and the court found the issues in favor of the defendant against the plaintiffs.

The action was brought to recover upon a written contract made by the plaintiffs with the defendant, wherein the plaintiffs, for the sum of \$1470, agreed to provide and furnish labor and material, and to make, erect, build and finish in a good substantial and workmanlike manner all the mason work, stone work and cement work as specified in the mason's specifications for a one-story and basement brick building on a lot owned by the defendant. The plans and specifications for the construction of the building were furnished by architects employed by the defendant. The plaintiffs, in their statement of claim, set out that their claim is for \$300, being the balance due on the contract, and \$186.87 for extra work done and materials furnished and interest upon the amount due.

The affidavit of defense denies the indebtedness and denies any request for extra work or materials and sets

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up various matters with reference to which the work was improperly done. The questions presented by the assignments of error are mainly questions of fact, although it is claimed that there were erroneous rulings in the admission of evidence on the part of defendant.

We have reviewed with care the testimony and we think that the finding and judgment are not supported by the evidence in the case. We are convinced that there should have been a recovery allowed to the plaintiffs for the extra work which they did and for some portion at least of the balance due on the contract. The evidence shows a substantial performance of the contract and there is no dispute in the evidence as to the extra work ordered by the defendant. The defendant herself superintended the erection of the building and from time to time made changes in the plans and ordered additional work.

We are of the opinion that the conclusion of the trial court was contrary to the evidence. The judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

GLADYS LINN,
Defendant in Error,

vs.

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,
Plaintiff in Error.

MURKIN TO MUNICIPAL COURT
OF CHICAGO.

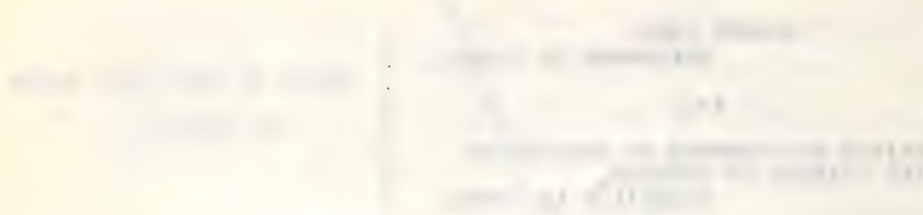
191 I.A. 117

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This record brings before us a judgment for \$200 recovered in the Municipal Court of Chicago by Mrs. Gladys Linn, defendant in error, hereinafter called plaintiff, against the United Brotherhood of Carpenters and Joiners of America, plaintiff in error, hereinafter called defendant.

The plaintiff below brought suit as the widow of Robert Linn, who was a member of the defendant Brotherhood. By the constitution and by-laws of the Brotherhood, a member, whose membership had existed for one year or more, or his designated beneficiary was entitled to receive from the Brotherhood what is called in section 86 of the by-laws the member's funeral donation or benefit of \$200.

The defendant filed an affidavit denying that the plaintiff was entitled to the \$200 funeral donation, and admitting that Robert Linn, her husband, was a member in good standing at his death, and denied that the plaintiff was named as beneficiary. The affidavit further says that the death of Robert Linn was caused by intemperance or his own improper conduct, and that he died on or about August 30, 1912, of delirium tremens, caused by the excessive use of alcoholic liquors, and that the plaintiff is not entitled to recover for the reason that sections 95 and 116 of the constitution provide that any member whose disability or death is caused by his own intemperance or his own improper conduct shall have no claim on the



APPENDIX

Table of contents of the Appendix, showing the page numbers of the various sections.

Section 1. General principles of the system.

Section 2. Description of the system, including the various components and their functions. This section is divided into several sub-sections, each dealing with a specific aspect of the system.

Section 3. Detailed description of the system, including the various components and their functions. This section is divided into several sub-sections, each dealing with a specific aspect of the system.

Section 4. Summary of the system, including the various components and their functions.

Section 5. Conclusions and recommendations. This section discusses the results of the study and provides recommendations for further research and development.

funds of the United Brotherhood.

The case was tried before the court with a jury and the verdict was returned in favor of the plaintiff and against the defendant for \$200, and judgment was entered on the verdict.

The great preponderance of the evidence in the case shows that Robert Linn was addicted to the excessive use of alcoholic liquors, and that he died from the effects thereof; that he was addicted to the excessive use of alcoholic liquors for the last ten or twelve years of his life, is not denied by the plaintiff. Neither is it denied that he died from delirium tremens. Upon a review of the evidence, we think it clearly preponderates in favor of the defendant, and the verdict of the jury and the judgment are manifestly wrong. Under the provisions of the constitution and by-laws of the defendant order, which formed a part of the contract, the plaintiff is not entitled to recover upon the evidence contained in the record.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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CRESCENT FUEL COMPANY,
Defendant in Error,

vs.

DAVID BERNSTEIN and LENA
BERNSTEIN,
Plaintiffs in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

191 I.A. 118

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The Crescent Fuel Company, plaintiff, defendant in error here, sued David Bernstein and Lena Bernstein, plaintiffs in error, in the Municipal Court of Chicago, and recovered a judgment for \$120.30. The case was tried before the court without a jury.

The statement of plaintiff's claim shows that the action was brought for coal sold and delivered to the defendants. The defendants are not sued as partners. The affidavit of merits filed by the defendants denies the amount of coal delivered and denies the ordering of the items for trimming, and admits that they are indebted to the plaintiff for \$6.48, which they are willing to pay and no other sum whatsoever.

Before the trial the defendants filed a petition for a change of venue from the Judge before whom the case was pending in due form and properly sworn to and moved the court for a change of venue in accordance with the prayer of the petition. The court denied the motion for a change of venue.

In our opinion the court erred in denying the motion for a change of venue. It should have been granted.

There is no evidence in the record tending to show that Lena Bernstein is indebted or was indebted at the

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time of the trial to the plaintiff in any sum whatever. The judgment is, therefore, erroneous as to Lena Bernstein. It was improper for the court to give judgment against both defendants. (Davis v. Johnson, 41 Ill. App. 22).

For the errors indicated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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MR. V. FRICK & CO., a corporation,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, a corporation,
Appellee.

APPEAL FROM SUPREME
COURT OF COLE COUNTY.

1911 A. 119

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

In June, 1902, J. B. Bowman was a traveling salesman for the plaintiff below, appellant here. He carried with him woollen samples of the plaintiff, each one and one-third yards in length. On January 7, 1902, he was in Onalaska, Arkansas, a lumber town, and the headquarters of the Onalaska Lumber Company. The samples carried by Bowman as salesman were cut in one and one-third yard lengths with a view to their subsequent use in the manufacture of men's clothing, and when a line of goods was closed out in the Chicago stock room plaintiff would recall the samples of such line from its salesman. Bowman, when he was in Onalaska, was at the end of his route and desired to return his samples such as had not already been returned by him. The record shows he had with him at that time approximately 15 or more samples. He packed his traveling-man's trunk in the office of the Onalaska Lumber Company and in the presence of A. P. Robertson, the commissary clerk for that company. The only railroad that ran through Onalaska was the defendant company. Two trains daily ran through Onalaska, one in the morning going north and one in the evening going south. Bowman intended taking the evening train on June 7th for the south, and, after packing his samples and nailing up the box and addressing it to the plaintiff at Chicago, he left the box with Robertson to be shipped

on the next morning train going north. Robertson delivered the trunk of samples, together with three copies of the bill of lading made out to the plaintiff at Chicago, to the conductor on the north-bound freight on the morning of June 8, 1902, - the morning after Bowman had left Onalaska. The defendant company had no billing agent at Onalaska, and it was customary to hand bills of lading for shipments going from Onalaska to the conductors on the trains running north and south, and the bills were issued by the railroad company's agent either at Eagle Mills or Euclid, the nearest stations respectively north and south to Onalaska at which the defendant company had a billing agent. The goods were never received by the plaintiff and this action was brought to recover the value of the samples.

The only defense made to the action was the testimony of two conductors of the company, Graham and Rainey, and a special agent by the name of Latham. The testimony of Graham and Rainey tended to show that on the 7th and 8th of June, 1902, their record books, which it was their duty to carry, with reference to the receiving and checking out freight, had no entries of the receipt of the trunk of samples in question. The testimony of Latham showed that he had investigated the local freight offices of the defendant and that he found no entries or record of the shipment of the trunk in question to the plaintiff at Chicago, Illinois, on June 7, 1902. The testimony of these witnesses was received by the trial court over the objection of the plaintiff, the objection being that parol evidence to prove that an original private writing does not show a certain fact is inadmissible as not the best evidence of the fact sought to be proved, and Blackburn v. Crawford,

3 Wall. 178; Aspinwall v. Chicago, 149 Ga. 437; and Holliday v. Griffith, 108 Id. 803, are cited in support of the objection. The inadmissibility of the negative testimony offered seems to be sustained by the cases cited. The testimony, however, was inadmissible on another ground, namely, that it did not answer the testimony of the plaintiff or tend to answer it. The proof on the part of the plaintiff was that the trunk with samples was shipped on June 8, 1902. There is no claim or proof in the evidence offered on behalf of the plaintiff that the shipment was made either on the 7th day of June or on the 9th day of June. The date of the actual shipment was fixed by the testimony of the plaintiff's witnesses. Proof that the shipment did not appear in the books kept by the defendant's conductors on different dates did not tend in any wise to answer the testimony of the plaintiff. Just the reason for the defendant's avoiding June 8th in its search for evidences of shipment, it is difficult to understand, but such appears to be the fact. As to the question of admissibility or inadmissibility of parcel evidence to prove what is not contained in a private writing, the authorities disagree, but whatever may be the decision on that question, the error of admitting the evidence in this case relating to other dates than the date on which the plaintiff's testimony showed the trunk was shipped, was reversible error for the reason indicated above, - that it did not tend in any way to answer the testimony offered on behalf of the plaintiff. The evidence on behalf of the plaintiff of the shipment of the trunk on the 8th day of June, 1902, was clear, definite and positive, and, even if the negative testimony offered by the defendant and received could be considered as competent evidence, it did not

overcome the direct, positive and circumstantial evidence offered by the plaintiff. The judgment, in our opinion, is against the clear preponderance of the evidence. The motion for a new trial should have been sustained.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN B. DEVONEY and OTTO PRICE,
Defendants in Error,

vs.

HOWARD COOPER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1911.A.120

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

An action in forcible detainer was commenced in the Municipal Court of Chicago by the plaintiffs, John B. Devoney and Otto Price, against defendant, Howard Cooper, for the possession of the premises described as the third floor flat of the building known as 1227 North Clark street, Chicago, Cook County, Illinois, leased to the defendant below by the plaintiffs on May 20, 1913, for a period of two years, at a total rental of \$480, payable in monthly instalments of \$20 each. The case was tried by the court and a jury. The parties will be referred to as plaintiffs and defendant as known and described in the court below.

It appears from the evidence that the defendant, Howard Cooper, had gone into possession of the premises under his lease and had paid the rent for the months of May and June, 1913; that early in July of that year, one of the plaintiffs had a conversation with the defendant Cooper in which he stated that he desired to make certain alterations in the entrance and stairway leading from the street to the flat occupied by Cooper, and that it would be necessary in order to make such alterations to provide another means of ingress and egress to and from the flat for Cooper during the time the alterations were being made, and that in consideration of the consent of Cooper to allow the

alterations to be made, and the inconvenience occasioned to him thereby, the plaintiffs would not collect or demand any rent until the proposed alterations and repairs were completed and Cooper should again have the use of the stairway. This arrangement was agreed to by Cooper and not until the November rent became due under the terms of the lease was there any demand made for rent. At that time a demand was made for the November rent. The alterations had not been completed at the time the demand was made, nor were they completed on December 5, 1913, when the lessors made a demand for the rent for three months, to-wit: October, November and December, amounting to \$67. During all this time the defendant Cooper had been deprived of the use of the stairway and part of his flat, and had not paid the monthly instalments of rent pursuant to the above agreement, by which Cooper alleges he was to be credited for the rent as paid each month as it became due, during all of the time that he was deprived of the use of the stairway and part of his flat.

The court refused to permit Cooper, the defendant, to introduce any evidence tending to show that there was such an agreement or that it was to be in force until the alterations in the premises were completed, on the ground that the agreement, if established, would tend to vary the terms of the lease; and thereupon the court instructed the jury to find the issues for the plaintiffs, DeVoney and Price, and a verdict was rendered in which the defendant was found guilty of unlawfully withholding from the plaintiffs the possession of the premises, and that the right of possession was in plaintiffs. A motion for a new trial was made by defendant, and denied by the court, and judgment was entered on the verdict. To re-

verse the judgment this writ of error is prosecuted.

In our opinion the court erred in excluding the evidence offered by the defendant. The agreement, of which the defendant tendered proof, was not a modification of the lease. It was an agreement with reference to the payment of rent; that is, that the monthly instalments of rent due according to the lease were to be considered as paid when due by the defendant Cooper in compensation for the loss of the use of a part of the flat rented by him and for the inconvenience suffered by him while deprived of the enjoyment of the stairway and entrance to the premises. The agreement, in other words, was tantamount to an acknowledgment of the payment of the rent as the same fell due for and during the time that the alterations in the premises were being made by the plaintiffs (landlords) for their own convenience and benefit. It appears from the record that the agreement was brought about at the instance of the lessors, the plaintiffs, and was primarily for their interest and benefit. The parties had two conversations with reference to the matter, - one in the fore part of July, 1913, at the office of the plaintiffs, in which conversation the plaintiff DeVoney advised Cooper that for certain reasons mentioned it would be necessary for him to tear out the stairway leading from the street entrance of the building to the flat occupied by Cooper and remodel the same, and that if Cooper would permit this to be done another means of entrance to the flat would be provided temporarily and he would not be expected nor called upon to pay any rent while the alterations were being made, and until the stairway was again replaced. At this conversation the defendant Cooper told DeVoney that he would think the matter over. A second conversation was had between the plaintiff DeVoney and defendant Cooper in the presence of one William

King, agent of DeVoney, and the wife of Cooper. This conversation occurred on the premises occupied by Cooper shortly after the previous conversation. At this time DeVoney again stated the reasons for desiring to make the alterations in the stairway leading to the flat, and stated that if Cooper would allow these alterations to be made, he would not be called upon to pay rent until the same were completed. Cooper and his wife both agreed to this arrangement and DeVoney then turned to his agent, King, and instructed him not to collect any rent from Cooper until the stairway was again in place. The evidence offered tended to show that immediately after this last conversation the alterations were begun. The stairway was torn out and Cooper was provided with another means of ingress and egress to and from his flat by making a hole through the brick wall between the defendant's flat and the flat next north and adjoining it, allowing the defendant to pass through two vacant rooms and down another stairway to the street. It also appears from the offered evidence that the defendant suffered great inconvenience and interference with the use and enjoyment of the flat during the time the alterations were being made on account of the dust, dirt, cold and the improper boarding up of the doorway, the removal of part of a closet belonging to the flat in connection with the removal of the stairway, and the use of the temporary entrance and stairway provided; and further that the plaintiffs did not call upon the defendant for any rent from the date of the said agreement until November when a demand was made only for the rent for the month of November. On December 8, 1913, it appears that the plaintiffs demanded from the defendant three months' rent, namely, for October, November and December, and for failure to pay the rent, the suit for forcible detainer

was started. No demand was ever made for the rent for the months of July, August and September preceding.

The evidence does not show any intention on the part of the parties to the agreement to vary the terms of the lease between them. No change in the terms of the lease was made or intended. This was a question of fact which should have been submitted to the jury as well as what was actually done under the agreement. It is clear, we think, from the nature of the agreement itself and from the fact that it was requested by the plaintiffs, the lessors, and was for their particular interest and benefit, that each of the parties temporarily waived certain rights which they had under the lease, and intended merely to cancel or set off the claim for rent on the part of the plaintiffs against the claim for damages on the part of the defendant; or, in other words, to credit the rent as paid in lieu of an allowance to the defendant, lessee, in the nature of compensation for the inconvenience suffered by him.

In our opinion, the trial court erred in excluding the evidence offered and in directing a verdict. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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GEORGE EHRT, trading as GEORGE
EHRT & COMPANY, *P. in Error*
~~Appellant,~~

vs.

V. MARRONE and R. LOFARO, doing
business as MARRONE & LOFARO,
~~Appellees.~~
D. in Error

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

191 I.A. 121

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The bill of complaint in this case was filed by George Ehrt, complainant below, appellant here, against V. Marrone and R. Lofaro, doing business as Marrone & Lofaro, and their attorneys, Edward L. England and Elbert C. Ferguson, to restrain the prosecution of a suit in the Municipal Court of Chicago brought by Marrone and Lofaro against the complainant.

The bill charges non-residence of Marrone and Lofaro and their insolvency and sets up a claim against Marrone and Lofaro in excess of any claim they have against the complainant, and that the claim of complainant against defendants cannot be set off in the suit at law.

The bill was filed on October 23, 1913. An injunction was recommended by a master in chancery, and a restraining order was entered. A motion was made by England and Ferguson, attorneys representing the defendants in the action at law, to dissolve the injunction on the face of the bill. Pending the decision on this motion, the same defendants, England and Ferguson, filed a general and special demurrer to the bill. Thereupon the chancellor overruled the motion to dissolve. The demurrer sets up three special grounds: (1) no offer to do equity on the part of complainant; (2) the bill does

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not allege loss suffered by complainant which arose from or was caused by the fault, negligence or misconduct of any of the defendants; (3) that the demurring defendants were not proper parties to the bill.

The court sustained the demurrer, dissolved the injunction and dismissed the bill for want of equity.

The question is thus presented as to whether or not the bill of complaint sets up good grounds for an equitable set-off.

The first ground of demurrer is that the complainant does not offer in his bill to do equity. In our opinion this point is not well taken, for it nowhere appears from the showing made in the bill that the complainant was called upon to do anything as a condition for the relief prayed for. The complainant's claim, which it is sought to have set off against the suit at law, is far in excess of any claim due the defendants, Harrone and Lofaro. Their claim as averred in the bill is for \$825.42; the claim of the complainant against the defendant is for \$1384.77. It is therefore not apparent that the complainant was bound to offer to do or perform anything in order to entitle him to relief.

The second ground of demurrer is that the complainant does not allege that the loss he sustained or suffered arose from or was caused by the fault, negligence or misconduct of any of the defendants. This ground of demurrer is not well taken. The complainant alleges that Harrone and Lofaro did not follow the complainant's instructions in ordering the goods to be insured in the name of the complainant, but, on the other hand, caused the goods to be insured in the name of another party; and that instead of delivering the goods

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as instructed, they delivered, or caused them to be delivered, to F. B. Vandegraft & Co., instead of to the agent of complainant at Naples; that Barrone and Lofaro shipped the goods on their own responsibility and exercised complete dominion over them until they arrived in Chicago, Illinois, and thereby deprived the complainant of the protection which he would have had if they had been shipped as directed. The bill sets forth the instructions in detail given by the complainant to the defendants.

The third and last ground of demurrer is that the demurring parties, Edward L. England and Albert C. Ferguson, are not proper parties. The bill alleges that Ferguson and England are the attorneys for Barrone and Lofaro in the suit in the Municipal Court and are attempting to enforce the collection of the claim of Barrone and Lofaro, notwithstanding the fact that the complainant has a good, valid and existing claim against Barrone and Lofaro. The bill also sets up the non-residence of Barrone and Lofaro, as above stated, and their insolvency. Under such circumstances, even though Ferguson and England are not necessary parties to the bill, they are proper parties.

Upon the general question of the equitable right of the complainant under the facts and circumstances set up in the bill of complaint to justify a court of equity in interfering and causing a set-off where a court of law can afford no relief, it is settled, we think, that special circumstances may exist creating an equity which would justify such interference of a court of equity. (Rugles v. Trahern, 64 Ill. 55; Luncan v. Lyon, 3 Johns. Ch. 357; Williams v. Davies, 2 Sim. 461). Wherever it is necessary to effect a clear equity or to prevent irremediable injustice, a set-off will be allowed in equity even though the debts are not mutual. In this case the debts are

mutual. Insolvency is recognized as a distinct equitable ground of set-off. The bill avers that the defendants, Barrone and Lofaro, have dissolved their copartnership and have ceased doing business, and that since separating in business the defendants have resided in different jurisdictions, and that the complainant is informed and believes and states the fact to be that the said firm is insolvent and that it would be utterly impossible to collect a judgment from said firm because of such insolvency. The contention is made here that it was necessary, in addition to the allegation that the firm was insolvent, to allege that the individual members of the firm were insolvent. It was held in Meadowcroft v. The People, 163 Ill. 56, that the mere fact that the defendants did their banking business under the name of Meadowcroft Brothers did not make that mere name a legal entity and endow it with a personal existence distinct from and independent of the members of the firm, and that "Meadowcroft Brothers" was simply a firm name or trade name in which the co-partners did their banking business, and if they were solvent, then Meadowcroft Brothers were solvent, and if they were insolvent, then Meadowcroft Brothers were insolvent. We think the averments of the bill as to the insolvency of the defendants constituting the firm of Barrone & Lofaro are sufficient. Memphis & Charleston R. Co. v. Woods, 7 D. R. A. 605; and, as held in Doane v. Walker, 101 Ill. 628, we regard it as a strong equitable feature of the bill.

In C. D. & V. R. R. Co. v. Field, 86 Ill. 270, the bill sought to have a judgment restrained in order to enforce a set-off against it. A demurrer to the bill was overruled and a rule to answer entered, and the defendants elected to stand by

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their demurrer, whereupon a final decree was entered. The court said at page 272: "There is a natural equity that cross demands should be offset against each other; and that the balance should be recovered; and the court of chancery recognizes this principle and acts upon it in cases where the law cannot give a remedy in a separate suit, in consequence of the insolvency of one of the parties," citing numerous authorities. See also Hughes v. Trahern, Admx., supra.

Where insolvency exists (and it is admitted here by the demurrer) it is not necessary that the complainant's demand should be liquidated by a judgment. (Knapp v. Burnham, 11 Page 331; Davison v. Alfaro, 54 Howard's Pr. 481; Littlefield v. Albany County Bank, 97 N. Y. 586.)

In our opinion it would be contrary to natural justice and inequitable to permit the defendants Sarrene and Lofaro, who are admittedly insolvent and are non-residents, to collect their claim from the complainant and take the proceeds beyond this jurisdiction, and, by the interposition of such defenses as are raised by the demurrer, defeat the right of complainant to recover his claim for damages set up in his bill. The decree is reversed and the cause is remanded to the Circuit Court with directions to restore the injunction and proceed with the cause in conformity with the views expressed in this opinion.

REVERSED AND REMANDED.

S. F. SVENSON and HARROLD
M. SWENSON,

Defendants in Error,

vs.

LUCY ROTH and PAULINA
HOCKSTADTER,

Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 123

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

The defendant in error S. F. Svenson, together with one Harrold M. Swensen, signed a contract dated October 20, 1910, for the painting and interior finishing of a three story and basement building at the northwest corner of Garfield avenue and Mohawk street in Chicago, for \$740. A dispute having arisen about the carrying out of the contract and the payments due, the defendant in error S. F. Svenson alone sued the plaintiffs in error, Roth and Hockstadter. Because of the very imperfect transcript of the record which has been prepared from preceipe orders and has been brought in sections here, we do not know what the "Statement of Claim" or anything answering to a declaration in the cause contained. The plaintiffs in error, after the transcript made in accordance with the original preceipe had been on file here several weeks, were good enough to file an additional one, giving the affidavits of the plaintiffs in error, made as defendants below as "Affidavits of Merits", stating the nature of the defense. But they did not furnish a copy of the "Statement of Claim", nor has the defendant in error supplied the deficiency. By this second transcript, however, it appears that on March 11, 1912, leave was granted the plaintiff S. F. Svenson to amend "Statement of Claim" filed by making H. M. Swensen a party

plaintiff, and by a third transcript filed some months later a nunc pro tunc order of the Municipal Court entered as of March 11, 1912, was shown, amending the "Statement of Claim" and "Summons" in the cause by making Harrold M. Swensen a party plaintiff with S. F. Evensen. Another order was also shown entered as of March 30, 1912, amending the judgment of the Municipal Court in the cause by changing the word "plaintiff" wherever it appeared in the record of the judgment, to the word "plaintiffs". These were consent orders, it would appear, although their occasion had been an objection urged in this Court to the judgment because it was in favor of Evensen alone. The mechanical arrangement of the transcripts, particularly that of the second one, and the absence of that which seems to us of primary importance in passing on the questions sought to be raised by the writ of error, suggest to us the language used in the affidavits of merits made by the plaintiffs in error when describing their grievances against the defendant in error. "The work was done" they say, "in a slovenly, careless and unworkmanlike manner." This proposition is one of fact, however, and the Court below evidently found against the accusation of the plaintiffs in error. Inspection of the "Additional Transcript" filed here November 22, 1912, would prove that its fabricators were not entitled to a similar finding. We must reprehend the foisting upon us of a record so defective in both matter and manner. If it is worth while to bring a case here from the Municipal Court, it is worth while to see that it is presented by a transcript properly bound and held together and containing all that it is necessary for us to consider to pass on the merits of the controversy. The briefs have not given us much assistance. But with one statement in the "Reply Brief for the Plaintiffs in Error" we find ourselves

in substantial accord: "It is impossible to determine from the record how much the Court allowed, if anything, under either contract."

For that very reason we see no justification for our interfering with the finding and judgment at which the Court from the evidence arrived. The contention of the plaintiffs in error to the contrary seems to be primarily based on the position that as to one building on which painting was done, Svenson alone was the contractor, and as to the other, Svenson and Swensen were contractors. Even this is not clear to us. The "Plaintiff's Exhibit 3" is called a contract in the briefs, but it is merely a memorandum of what is proposed to be done to the rear house and at what prices, and the testimony of the plaintiff Svenson neither upon examination nor cross-examination seems to indicate that there was any distinction between the two undertakings, so far as responsibility for them went. He uses the pronouns "I" and "we" indiscriminately in relation to both jobs, and says the men were "working off and on from the old building to the new one." It is evident that both buildings were constructions considered as under one management. If they were so, there is no force in the suggestion that "joint plaintiffs" could not recover for anything done on the rear building, nor a single plaintiff for anything on the front building.

There is much said about the absence of a certificate from the architect and neglect to submit the dispute to arbitration; but we do not think the argument is much to the point.

There was an architect's certificate for \$275 unpaid on account of lack of funds to meet it, which related to the new building, and there was certainly enough due on the old building, about which there could hardly be a dis-

G. S. BEYERS,
Defendant in Error,

vs.

ANDERSON TOOL COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1911A.124

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

The defendant in error, Beyers, was authorized by some principal in December, 1909, to sell in Chicago computing scales made by the Anderson Tool Company at Anderson, Indiana. The terms of his authorization or employment were that he was to have for compensation or commission 35 per cent of the amount for which each scale was sold, 70 per cent of the 35 per cent - that is 24½ per cent of the selling price - to be paid at once, and the remaining 30 per cent or 10½ per cent of the selling price to be paid when the payments for the scale, which was usually sold on monthly instalments, were completed.

Beyers sold many scales and received 70 per cent of the promised commission on each scale. But the 30 per cent remaining he did not receive even when the payments on the scales had been completed, as he believed. As the person actually communicating the authorization or employment and the terms of them to Beyers - one Fertick - had told him that he, Fertick, represented the Anderson Tool Company in Chicago, and as Fertick occupied a business place in which were kept Anderson Tool Company's scales, and as Fertick told him also that if he, Beyers, sold the Anderson Tool Company's scales the Company would pay him, Beyers, a certain commission, but re-

serve 30 per cent of it until the scales were respectively paid for, and as Fertick gave him a book of blank forms of contract orders prepared and printed in triplicate, addressed to the Anderson Tool Company, to be signed by the purchasing party and also by him (Beyers) thus: "For the Anderson Tool Company, By G. S. Beyers, Salesman" (one of said triplicates being kept by the purchaser, one sent to the factory and one held by the salesman), and as on the reception of the first of these orders, so far from making any objection to the employment and agency expressed in its terms and implied in its acceptance, the Anderson Tool Company sent a check for his commission direct to Beyers, and as for subsequent contract orders of the same form he received no repudiation or assertion that he was transcending his authority, but on the contrary did receive through Fertick in each case thereafter the promised 70 per cent of 35 per cent of the selling price, Beyers quite naturally supposed that the promise of the reserved 30 per cent was the promise of the Anderson Tool Company and looked to it for payment. Not receiving it, he sued the Anderson Tool Company in the Municipal Court of Chicago. He secured a judgment from that Court for \$126 after a trial before the Court without a jury. The Anderson Tool Company sued out a writ of error to the Municipal Court to reverse the judgment, and it is now before us for disposition.

The first matter of defense relied on below and urged here as ground for reversal is that the amount of the plaintiff's claim was not precisely set forth and sworn to in the Statement of Claim. There is no merit in this contention. The "Praecipe and Statement of Claim" by which the suit was begun contained a statement that the "claim" was

for \$500, which was the naming of an ad damnum. The nature of the claim was fully stated, but it was frankly admitted that the exact number of scales sold by the plaintiff and the exact number that had been fully paid for could only appear by defendant's books and records when produced in court.

The "Affidavit of Plaintiff's Claim" said that the demand was for money due for services and commissions as set forth in the Statement of Claim, and that there was due to plaintiff from the defendant a sum of money the exact amount of which was unknown to the plaintiff. We consider this entirely sufficient under the 4th Section of the Municipal Court Act. We should also hold it sufficient under a reasonable construction of Rule 16 of the Municipal Court, invoked by the plaintiff in error, if that rule were before us, which it is not.

The main contention of the plaintiff in error, however, is on the merits. It maintains that the finding and judgment are against the clear preponderance of the evidence. As to this, we need only say that we do not assent to this position. In our opinion the matters that we have before recited were sufficient to justify the Court in finding that the Anderson Tool Company had ratified the employment of Meyers as a salesman for it under the terms made. It accepted the benefits of the employment and is estopped to deny it.

It is vigorously argued that because Eastman and Gale, now Secretary and Vice President of the Anderson Tool Company, separately swore that Meyers never was employed by the Anderson Tool Company, and Jesse A. Morris, a bookkeeper for the Anderson Tool Company, when asked:

"I will ask you to state now whether or not there has ever been any one by the name of C.S. Meyers employed by the Anderson Tool Company", answered, "Not in their direct employment, that is, we never had a contract."

the scale was heavily turned in favor of the defendant.

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To further support this position it is pointed out that Eastman and Gale, who at the time of the sales in question were doing business as partners in St. Louis, testified also that during that time they controlled the entire output of the Anderson Tool Company; that Fertick worked for them, and Beyers must have worked, therefore, either for Fertick or for them - not for the Anderson Tool Company. We do not think that all these things separately and together, even fortified by the stipulation that if Fertick had been on the stand he would have sworn that he was "sales agent for Eastman and Gale", rendered it imperative that the trial Court should have held overborne the matters before recited on which plaintiff relied to establish his claim.

Mr. Eastman also testified that he had been connected with the Anderson Tool Company as Secretary only since May 1, 1911. Mr. Gale also swore that he had been connected with the Anderson Tool Company as Vice President only since May 1, 1911. Yet there were introduced in evidence in rebuttal a letter dated May 17, 1910, signed Eastman & Gale, written on a letterhead reading:

The Anderson Tool Company,
C. W. Hooven, President,
A. G. Gale, Vice-President,
H. Eastman, Secretary,
B. D. Emanuel, Treasurer",

and another on the same letterhead dated June 13, 1911, and a third dated April 5, 1911. These letterheads do not differ at all from those under which other letters of Eastman & Gale were written at later dates. Besides this there is in evidence a formal contract appointing a "Sales Agent" on April 11, 1910, not for Eastman & Gale, but for the Anderson Tool Co., and this contract is signed, "Anderson Tool Co., Party of the First Part, By Eastman & Gale." This is in the face of a distinct assertion by Mr. Eastman in his deposition that Eastman & Gale had no authority to employ any salesmen for

the Anderson Tool Company, or to make any contracts for the Anderson Tool Company except contracts with the purchasers of machines manufactured by the Company, and that from October, 1908, until January, 1911, neither the firm of Eastman & Gale nor either of them employed any salesmen for the Anderson Tool Company.

Perhaps the discrepancy between the statements of these witnesses and the representations sent out under their names detracted in the mind of the trial Judge from the force of the positive assertions on which defendant relies. We can not say that it should not have done so, notwithstanding the highly aggrieved tone which the defendant's counsel assumes concerning it in his argument.

Certainly the letters and the contract sent out by Eastman & Gale were impeaching documents, because they showed representations by them contradictory to their statements in their depositions. We think they were properly admitted for this reason, and we do not think there are any remarks or conduct of the trial Judge shown in the record which demand our animadversion.

The sum due was sufficiently proven by the defendant's own witnesses. The fact that at earlier stages of the trial the Judge remarked that he did not have the data to compute a finding on, does not show that he could not afterward acquire them.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

351 - 19751

JOHN DOOLEY,
Appellee,

vs.

PATRICK AHERN, BRIDGET AHERN
and E. R. STEGE BREWERY,

On Appeal of E. R. STEGE BREWERY.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

1911 A. 140

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure entered by the Superior Court of Cook County March 17, 1913. The decree provides for the sale of lot 66 in Schoenberger's subdivision of Block 63 in the subdivision of Section 13 - 34 - 14, situated in Cook County, under the usual terms and conditions of a foreclosure sale, the proceeds to go: First: (after payment of fees and costs) to satisfy the amount of \$3636.40, with interest from the date of the decree, secured by the mortgage in the bill of complaint alleged and described, said "mortgage" thus described being in form a warranty deed from one Patrick Ahern and Bridget Ahern, his wife, to John Dooley, of the before described premises, dated October 20, 1911, acknowledged October 20, 1911, and filed for record in the Recorder's office of Cook County as Document Number 4862980 on October 21, 1911, at 11:34 A. M., according to the certificate of the Recorder thereon endorsed. Second: (if there should be a surplus of proceeds) to pay Patrick Ahern one thousand dollars for a homestead estate which the decree finds he is entitled to in the premises, subject only to its waiver in the conveyance; and Third: (if there should be a further surplus) to such disposition as the

Court might thereafter further order; the said further surplus to be held meantime subject to such further order of the Court by the Master making the sale.

There was and is no objection to this decree on the part of the defendants who made the conveyance, Patrick Ahern and Bridget Ahern; but there was a third defendant interested in it - the E. R. Stege Brewery, the allegation of the bill of complaint against which was as follows:

"Your orator further shows unto your Honors that subsequent to the date of the record of said deed from the said Patrick Ahern and Bridget Ahern, his wife, to your orator, The E. R. Stege Brewery, a corporation, recovered a judgment by confession against the said Patrick Ahern and his wife in the Circuit Court of said Cook County for the sum of to-wit, sixteen hundred and five dollars and thirty-eight cents (\$1605.38) and costs; that thereafter in the month of January, 1912, the said The E. R. Stege Brewery caused an execution issued upon said judgment to be levied upon the interest of the said Patrick Ahern in the above described real estate, and in pursuance of such levy the said premises were on, to-wit, the 6th day of February, 1912, sold by the Sheriff of said Cook County to the said E. R. Stege Brewery, which thereupon recovered from said sheriff and still holds a certificate of such Sheriff's sale purporting to convey the said premises, and your orator shows that the interest of the said E. R. Stege Brewery in said premises is subject and subordinate to the lien and interest of your orator therein."

The decree finds as to the claims of The E. R. Stege Brewery in these words:

"The Court further finds that the defendant Patrick Ahern is seized and entitled to an estate of homestead in the premises hereinafter described, subject only to the lien of the complainant, and that the interest of the defendant The E. R. Stege Brewery in said premises is subject and subordinate to the said homestead."

The E. R. Stege Brewery has appealed from the decree to this Court and has assigned the following errors:

- First. The admission of improper evidence.
- Second. The entry of the decree in favor of the complainant.
- Third. The finding of the Court that there was due the complainant \$2836.40, whereas it should have found that a large part of this sum was barred by the Statute of Limitations.
- Fourth. The finding of the Court that the lien of the complainant on the premises was paramount to the lien of the judgment in favor of The E. R. Stege Brewery.

Fifth. The failure of the Court to find that the deed of conveyance under which the complainant claims a lien was a fraudulent conveyance, made for the purpose of sinsering and delaying the E. H. Stege Brewery.

Sixth. The permitting the complainant to offer proof of a subsequent promise by the defendant Patrick Ahern to prevent the bar of the Statute of Limitations after the proofs had been closed, case argued and submitted to the Master for his conclusions.

Seventh. In substance the same as the Fourth.

Eighth. The finding that Patrick Ahern and Bridget Ahern are entitled to an estate of homestead against The E. H. Stege Brewery.

Ninth. The allowing complainant the benefit of fractions of a day in finding the priority of his lien.

As a preface to the discussion of these legal propositions, a statement of the facts on which they are based is desirable. These facts are very simple.

John Dooley, who was an uncle of Bridget Ahern, the wife of Patrick Ahern, and about seventy-five years old at the time of giving his evidence in 1912, had nine years before that time, in September, 1903, loaned Patrick Ahern \$500, which Ahern promised to repay with 6% interest, but without stipulation as to time, thus making it payable on demand. In May, 1905, Dooley loaned Ahern \$450 more on a similar arrangement, and in April, 1906, \$300 more. In August, 1909, at the solicitation of Mrs. Ahern, Dooley lent Ahern another \$500. When he did so, the Aherns said they were trying to sell their property and as soon as they could sell it they would pay with interest. It is not made definite by the testimony that, as the Master finds, this was an express promise to pay "all of said loans", but it is certainly a fair inference from all the testimony that the statement about payment referred to all the various sums previously loaned as much as to the \$500 loaned contemporaneously. Be that as it may, there is testimony that on the next addition to the advances, which was made in February, 1910, Mr. Dooley told Mr. Ahern that he would have to have all his money soon, together, and Mr. Ahern said he would give it to him soon, that he expected

to sell his saloon license and his property and that when he did "sell the place" he would "pay every cent."

After February, 1910, Mr. Dooley called on Mr. Ahern for his money several times. Ahern in October, 1910, told Dooley that he did not have the money but would pay it as soon as he could sell his property. Thereupon Dooley told him, "I have to have my money. I must be secured in some way, and if you are satisfied to sell me the property and secure me in my money, that is all I want, and as quickly as you pay me my money you can have your property; I don't want it, only my money." Thereupon Ahern and his wife executed the warranty deed foreclosed in this suit as a mortgage to secure the various loans and interest before recited, aggregating \$2512.50 at the time of the Master's Report, and \$2835.40 at the time of the decree. The deed duly waived homestead exemption. It was acknowledged and recorded as recited in the decree.

Ahern had been in the retail liquor business on the premises described from September, 1903, to May, 1910. The lower part of the two story building on the premises was used as a dram shop, the upper part as a residence. In May, 1910, Ahern and his family rented both shop and flat to a tenant, but with the purpose of returning after the lease had expired. He did return and occupy the premises and take up his residence therein in February, 1912.

During the time that Ahern was conducting his business on the premises he became indebted to the appellant, The E. R. Stege Brewery, and with his wife, Bridget Ahern, had given to that corporation a judgment note, and at 12:11 P. M. of the same day (October 21, 1911), on which at 11:34 A. M. the deed herein foreclosed was filed for record, a narr and cognovit, based on said note and warrant of attorney, and on which a judg-

ment in favor of The E. R. Stege Brewery was immediately entered, were filed in the office of the Clerk of the Circuit Court of Cook County. An execution afterwards issued on said judgment and a levy under it was made on the premises described in the deed. February 8, 1912, the premises were sold by the Sheriff under said levy to The E. R. Stege Brewery and a certificate of sale duly issued, which certificate was duly recorded and is still owned by The E. R. Stege Brewery.

The assignment of error alleging the admission of improper evidence may be summarily disposed of. It is supported only by the argument that it was not in the exercise of a reasonable discretion for the Master, after the case had been declared closed and argument had been heard, to open it to hear evidence on a subsequent promise to pay loans which were barred by the Statute of Limitations. We see no abuse of discretion in this. There is no contention that appellant was cut off from attempting to show the contrary or from further argument of the proposition. And it was immaterial in any event. The giving of a mortgage to secure a pre-existing debt will stop the running of the statute or revive a debt where barred.

Apart from this assignment of error, the contentions of the appellant seem to be five. It maintains:

First, that the conveyance or mortgage to Woolley was fraudulent in fact.

Second, that it is constructively fraudulent - fraudulent by a presumption of law against the lien of the appellant's judgment.

Third, that if this be not true, the conveyance is presumptively fraudulent in fact, and the burden was upon the appellee to prove superior equities, which he did not do.

Fourth, that in the absence of superior equities,

no notice should have been taken by the Court of fractions of a day. The record of the conveyance and the entry of the judgment should have been considered contemporaneous.

Fifth, a homestead estate should not have been allowed the Aherns precedent to the lien of the judgment.

Of any fraud in fact there is no evidence whatever. That the amount of money found by the decree to be secured by the conveyance was as a matter of fact loaned by Dooley to the Aherns was abundantly proven. There may be suspicious circumstances tending to show a desire by the Aherns to prefer Dooley to the Brewery and of a race of diligence to accomplish that result. There is no proof of this, for suspicion is not proof. But suppose it had been proved - what then? Dooley's debt was as legitimate as the Brewery's, and Ahern had a right to prefer either. His choice of the personal rather than of the business debt would not have been unnatural.

But because the conveyance was in form a warranty deed, although in fact a mortgage, it was, it is urged, constructively and conclusively a fraud on the rights of the appellant and must be postponed to them.

We know of no rule of law requiring or justifying this.

The warranty deed was constructively fraudulent as a warranty deed, but it is not asserted nor treated in this litigation as an absolute conveyance, and to the extent of the actual consideration it should not be vacated nor set aside. *Reidler v. Crane*, 135 Ill. 92.

The application of this rule is not avoided in this case by the fact that in the original bill to foreclose after fully describing the conveyance as a mortgage, although in form a warranty deed, and asking a foreclosure of it as a mortgage, the complainant apparently out of superabundant

caution added to the prayer an alternative request, "or that in the event the aforesaid deed to your orator shall be construed by the Court as constituting a trust instead of a mortgage, then that the aforesaid levy and certificate of sale thereon may be cancelled and set aside as a cloud upon the title of your orator to said premises, and that your orator may have such other and further relief in the premises as the nature of his case may require and as to this Court shall seem agreeable to equity."

Even if this alternative prayer had not been stricken out by amendment afterward, it could not be said to be any attempt to assert or use the conveyance as carrying an indefensible title.

Nor do we think there is even a presumption of fact that the deed was made with a fraudulent intent, necessary for the complainant to meet by assuming the burden of proof to the contrary. But if there is, the burden has been assumed and satisfactorily borne. The stories of Dooley and the Aherns alike show no attempt to throw the security into the form of an absolute conveyance for the purpose of defrauding or delaying creditors, but merely an irregular but not unnatural method of giving and seeking security for a legitimate and meritorious purpose, and, at the utmost that can be said of it, an intention to prefer one legitimate debt to another.

The position that no notice should have been taken by the Chancellor in this case of "a fraction of a day" - that is the 37 minutes between the record of the deed and the entry of the judgment - is not well taken.

We do not assent to the argument of the appellant that some other superiority of equities must appear or the liens secured on the same day at different hours will share equally.

"whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into fractions of any other unit of time", is the language of the Supreme Court of Illinois in *Grosvener v. Magill*, 37 Ill. 240, and no better statement of the rule could be made.

As for the homestead estate allowed Ahern as against the appellant's claim, the counsel for appellant can only say that they do not believe the testimony concerning his intention to return to the premises when he left them in 1910. Suspicion, as we have hereinbefore said, does not take the place of proof, and we do not think there is any evidence to overcome the testimony that was given.

The remainder of the proceeds of the foreclosure sale, if there be any, after Dooley's claim and the homestead estate are satisfied, is to be paid into court, where it will be subject to the rights to be established or to be established by the Brewery; but we think that the Master and Chancellor were right in the priorities decreed, and affirm the decree.

We do not think the case one for damages for delay caused by a frivolous appeal, but on account of some omissions in the abstract furnished by appellant of matters which the appellees at least might properly regard as material, the costs assessed against the appellant should include an allowance for the additional abstract furnished by the appellees.

AFFIRMED.

JACOB FEDER,
Defendant in Error,

vs.

CLARA GREENBERG,
Plaintiff in Error.

BRANCH TO THE MUNICIPAL COURT
OF CHICAGO.

1911A. 144

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

March 20, 1913, Jacob Feder, the defendant in error herein, began a suit in the Municipal Court of Chicago, against Clara Greenberg and B. Greenberg. His claim was stated to be \$374.75. Its nature was, first "a balance due for labor and material furnished to defendant under a written building agreement dated March 18, 1912, between plaintiff and defendant, a copy of which is hereto attached", as the statement says, "which is for the sum of \$50.75." The copy attached purports to be a contract between B. Greenberg and J. Feder. The rest of the \$374.75 was made up of \$56 for "columns furnished by plaintiff to defendant on said building" and \$268 for "hardware furnished said building by the plaintiff for the defendant."

The affidavit of plaintiff's claim is to the effect that the nature of plaintiff's demand is "for balance due for labor and material furnished to defendants by plaintiff and for labor and material as above stated", and that the amount due is \$374.75. Clara Greenberg and B. Greenberg (after the service of process on the latter) both entered their appearance and for each Benjamin E. Cohen filed an "Affidavit of Merits." In one affidavit he states that he is the agent of the defendant B. Greenberg, and that the defense of said B. Greenberg to the plaintiff's demand is that

he is not indebted to Feder in any of the sums mentioned in the Statement of Claim. In the other, Cohen says the same thing for Clara Greenberg, but adds that Clara Greenberg denies "that she has had any dealing or contracts either verbal or written of any kind, character or description with the said plaintiff."

June 12, 1913, the Municipal Court sitting without a jury, the defendants being absent and not represented, heard the cause, found the issues against the defendants and entered judgment for \$374.

June 19, 1913, the defendants moved to set the aforesaid judgment aside. The Court sustained the motion and vacated the judgment.

The record then recites that on November 17, 1913, on motion of the plaintiff, the suit was dismissed against E. Greenberg, and further that "Clara Greenberg being absent and not represented", the case came on "in regular course for trial before the Court without a jury, and the Court, after hearing the evidence and the arguments of counsel and being fully advised in the premises", "finds the issues against the defendant Clara Greenberg", and entered judgment against her for \$374.75.

The defendant Clara Greenberg has sued out a writ of error to reverse this judgment, and a transcript showing the above proceedings was filed as a return to the writ. But no "Bill of Exceptions", "Statement of Claim" or "Stenographic Report", or anything answering to or taking the place of the same, has been preserved.

The plaintiff in error has made an assignment of errors based entirely on the statements that the finding of the Court is contrary to the law and the evidence and that the Court had no jurisdiction to enter judgment by default.

the Government of the United States of America, and the Government of the State of New York, do hereby certify that the following is a true and correct copy of the original as the same appears on file in the office of the Secretary of the State of New York:

That the said original is a true and correct copy of the original as the same appears on file in the office of the Secretary of the State of New York, and that the said original is a true and correct copy of the original as the same appears on file in the office of the Secretary of the State of New York.

Witness my hand and the seal of the State of New York, this 1st day of January, 1900.

Secretary of the State of New York.

Nothing is suggested to sustain this last position, but it is immaterial, for there is no "judgment by default" shown. On the contrary, the judgment defendant was in court by appearance although not actually present at the trial, and the judgment was given after evidence and arguments had been heard.

Nor can we find any reason in this record for saying the finding of the Court is contrary to the evidence. We do not know what the evidence was. No bill of exceptions has been preserved.

The argument of plaintiff in error seems to be that the Statement of Claim shows the claim under one construction of the statement to be wholly, and under another partially, founded on a written agreement which only S. Greenberg signed, and that consequently any evidence, whatever it might be, which showed a claim against Clara Greenberg alone must have been incompetent and insufficient to found the judgment on. This by no means follows. There might be conclusive evidence showing the assumption by each defendant of the premises made by one, or evidence that one of the original defendants was the undisclosed principal for the other.

Exactness and precision in the statement of claim in a fourth class case in the Municipal Court are not required. It is sufficient if the defendant is apprised of the nature of the demand against him. Variance is waived by failure to object, and though the statement of claim is inaccurate, reversal by this Court will not follow if prejudice is not shown to have followed.

Toledo Computing Scale Co. v. Tyden, 141

Ill. App. 21;

Schulze v. Gottschalk, 152 Ill. App. 20;

McDowell, Stokes & Co. v. Sharp, 157 Ill. App.
165;

Bekins Household Shipping Co. v. Grand
Trunk Ry. System, 162 Ill. App. 497.

In the absence of a Bill of Exceptions or Statement of Facts or Stenographic Report, there is nothing left for us to do but affirm the judgment of the Municipal Court, which is accordingly done.

AFFIRMED.

C. G. GOODWIN,
Appellant,

vs.

GREGON SHORT LINE RAILROAD
COMPANY,
Appellee.

APPEAL FROM THE MUNICIPAL COURT
OF CHICAGO.

1911A. 146

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago on November 11, 1913, on an instructed verdict of a jury, the Oregon Short Line Railroad Company, the defendant in this cause, obtained a judgment of nil capiat and costs against the plaintiff, C. G. Goodwin. The case was of the first class and the plaintiff prayed and was granted an appeal to this Court.

The statement of claim asserts the plaintiff's claim to be for damages to a large number of sheep and lambs caused by the failure of the defendant "to place six double deck sheep cars for said plaintiff for the shipment of said stock at Evergreen, Idaho, on September 1, 1910, in accordance with an order given therefor by said plaintiff to the agent of the said defendant at Layette, Idaho, August 15, 1910, and accepted by said agent of the defendant." The statement of claim proceeds to allege that the cars were not placed at Evergreen until September 18, 1910, and that the damages to the plaintiff's sheep (shown in their loss of weight through the delay) with a charge for the necessary extra services and board of a man, were \$1201.22.

An affidavit of merits denies any agreement on the part of the plaintiff to place cars for the plaintiff at Evergreen on September 1, 1910. It asserts further that -

"The said defendant did not accept any order for the placing of said cars at the point in question in any such manner as to constitute a contract for the furnishing of said cars at the place specified; that the said station of Evergreen, Idaho, is not located on the line of this defendant and this defendant is not now and never was under any obligation to furnish any cars to the said plaintiff or to any other person at that point, and that said defendant's agent at Layette, Idaho, referred to in plaintiff's amended statement of claim did not have any authority to accept an order, or make any sort of an arrangement for the placing of cars at Evergreen, Idaho, as aforesaid, a station located upon the lines of the Pacific and Idaho Northern Railway Co."

The outcome of the trial - a peremptory instruction by the Court to find the issues for the defendant - resulted from the fact that no evidence was presented by the plaintiff which showed the authority of the agent at Layette, denied by the defendant, while there was affirmative testimony of an Assistant General Freight Agent of the defendant (called by the plaintiff under Section 33 of the Municipal Court Act) that any acceptances of orders for cars by the agent of the short line at Layette in 1910 (the year of the transactions involved in this suit) of orders for cars on the P. and I. N. Railway were without authority, were for the mere accommodation of the shipper, and were transferred to the Agent of the I. I. N. line where the cars were to be loaded.

We are constrained on investigation of the record to agree with the Court below.

The evidence shows that Goodwin, the plaintiff, was a resident of Layette. Another resident of Layette named Short went to the station of the defendant at Layette on August 15, 1910, and told a Mr. Johnson, who was the station agent of the Oregon Short Line Railroad Company there, that he wanted to order twelve double deck sheep cars to be placed at Evergreen, Idaho, on the first day of September following. Six of these cars were to be used by Short and six by the plaintiff, Goodwin, in shipping lambs. Short told Johnson he wished to be

sure that the cars would be there on the date mentioned. Otherwise he would not bring his sheep from the mountains, feed being poor around Evergreen. Johnson told Short to come in again on August 23rd and he would know more about the cars. August 23rd Short called on Johnson as requested. Johnson then told him to come the following day and he would then know about the cars. On the following day, August 24th, Short and Goodwin together called on Mr. Johnson. Johnson then told them that the cars would be at Evergreen on September 1st, stating to them that he had a telegram from the "dispatcher" of the Oregon Short Line at Hampa that the cars would be at Evergreen on the date named. Hampa is a junction point of the Oregon Short Line with a line running to Boise City and one running from Emmett to Murphy, but it is not a junction point with the Pacific & Idaho Northern Railroad. It is east of Payette. The Pacific & Idaho Northern Railroad runs from a place called New Meadows southerly through Evergreen and other places to a junction point called Weiser, a town on the Oregon Short Line, eighty-five miles south of Evergreen and fifteen miles west of Payette.

On September 1st, Goodwin's ewes and lambs were at Evergreen but the cars were not. Goodwin says that he could then ascertain nothing positive about the cars and preferred to sell his lambs to waiting to ship them himself. But he sold them by weight, to be computed when shipped. They were shipped as soon as cars could be obtained. The cars were not obtained until September 18, 1910, during which time the lambs to be shipped lost weight.

It seems to us that reason and the logical conclusion to be derived by analogy from the general doctrines of agency coincide with the weight of authority in sustaining this statement, to be found in the opinion in Gulf, Colorado

and Santa Fe Railway Company v. Lodge, 10 Texas Civil Appeals Reports, 543 -

"A local station agent, in charge of a railroad company's business at a particular station, is presumed to have authority to represent the company in all matters connected with the transaction of its business at that particular station, but he is not presumed to have authority to act for the company at other stations, and when he attempts to do so his act, unless ratified, will not bind the company."

This proposition was laid down in the case cited as applying to the alleged contract of the station agent in behalf of the Company to furnish cars on the line of his own road, but at another station. If this be the law affecting such an alleged contract, a fortiori, it is true that a station agent has no such "implied," "presumptive", "apparent" or "incidental" authority to make a contract binding the road to furnish cars at a particular date on a foreign road.

There was no evidence in this case of express authority and nothing to show implied authority. Therefore, the burden was not (as plaintiff contends) on the carrier to show knowledge on the part of the shipper of limitation on the power of the station agent which rendered his alleged contract invalid. Such a rule only applies when the agent makes a contract within the scope of his apparent authority.

The plaintiff maintains that the telegram from the "dispatcher" atampa, which Johnson said he had received, ratified the promise of the agent, or that at least the testimony concerning it should have been allowed to go to the jury as an element proper to consider on the question of the agent's authority. We see no force in this. The dispatcher atampa, so far as is shown, had no greater apparent authority in this regard - that is, in the disposition of cars on a foreign road - than the station agent at Fayette. The evidence concerning the telegram is indefinite. All that is shown indeed concerning the whole transaction is consistent with an understanding be-

Received 10 November 2003; accepted 10 November 2003

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tween the parties at the time that it was the "best information" possible and not a contract which the shippers were obtaining from the station agent at Layette.

Nor can the contention be sustained that the furnishing of cars at Evergreen on September 18th was a ratification of a contract to have them thereon September 1st, or any evidence to go to a jury of such ratification. The testimony is that sheep cars were furnished to the Pacific & Northern Idaho Railway by the Oregon Short Line at Weiser, where they were placed on a transfer track, and that after they were so placed the Oregon Short Line Railroad Company lost control of them and that their distribution was made by the Pacific & Northern Railway.

Complaint is made of the refusal to allow or compel the witness Tuttle, the Assistant General Freight Agent of the defendant, to answer certain questions which were asked him by the counsel for plaintiff. We see no reversible error in the rulings. The questions concerning reception of orders by the Layette agent for the placing of cars on the Pacific and Idaho Northern Railway in years previous to 1910, were allowed and were answered. The answers did not sustain the plaintiff's case. The questions ruled out were similar questions concerning the reception of orders by a station agent at Lapra for the placing of cars on another foreign road - the Idaho Northern Railroad. The Court rightly held them immaterial.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

F. A. SHORT,
Appellant,

vs.

OREGON SHORT LINE RAILROAD
CO., a corporation,
Appellee.

APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

1911 A. 149

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

Reference to the opinion in Goodwin vs. The Oregon Short Line Railroad Company (No. 20256 in this Court) filed contemporaneously herewith, will show the transactions out of which this suit grew.

Although there are differences in the records in the two cases, the chief of which is that in this cause the plaintiff did not examine Tuttle, the Assistant General Freight Agent of the Oregon Short Line Railroad Company, there is nothing which differentiates it in principle or in the rules of law applicable to it from the Goodwin case. The number of sheep was different and the damages claimed greater, there was greater delay in selling and shipping and the shrinkage in weight was greater.

But for the same reasons set forth in the Goodwin case we hold that there was no evidence offered by the plaintiff which showed the authority of the agent at Payette to make the contract that is alleged by the plaintiff as the basis of his claim, and that therefore the jury were properly peremptorily instructed for the defendant.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

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LORD & THOMAS, a corporation,
Appellee,

vs.

SANITARY DRINKING CUP COMPANY,
a corporation,
Appellant.

SUPREME COURT OF ILLINOIS
OF COOK COUNTY.

1911 A. 150

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

The appellant, the Sanitary Drinking Cup Company, a manufacturing corporation, under date of November 8, 1911, made a written contract with the appellee, Lord & Thomas, a corporate advertising agency. The contract provided that the appellee, hereinafter called the plaintiff, should perform for the appellant, hereinafter called the defendant, certain services of a varied nature in the line of its business as an advertising agency, and that it should render said services upon certain terms and conditions stated. The contract was of considerable length and provided for details in the services not necessary to set forth. It contained these clauses among others material to this cause:

"We, the undersigned Sanitary Drinking Cup Company of Chicago, Illinois, in consideration of the advertising service to be rendered to us by Lord & Thomas as stipulated in page one hereof, do hereby contract for this service for a term of one year from date upon the terms and conditions therein and hereinafter stated. * * * * *

We agree to pay Lord & Thomas the net cost to them (exclusive of publishers' cash discounts) for all space they purchase for us in publications plus a commission of fifteen per cent above that cost as compensation for their services, excepting where the net cost of space to them runs less than 15 cents per inch, in which case the commission is to be twenty-five per cent. * * * * *

In consideration of the above services rendered to us by Lord & Thomas, we guarantee to them that their commissions on this

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James M. Conway
 Clerk

year's business with us shall be equal to \$1500 annually as partial compensation for the expense they are under in investigating our field and planning our advertising campaign.

Should the commissions paid by us to Lord & Thomas within twelve months from date of this contract be less than Fifteen Hundred Dollars, we agree twelve months from this date to pay them in cash the difference between such lesser amount and Fifteen Hundred Dollars."

The contract was signed on the part of the defendant as follows:

Sanitary Drinking Cup Co.
Harry W. Hahn,
Secy. & Treas."

During the year, by defendant's own action, the advertising contemplated by the contract was discontinued when the "commissions" provided for had only reached \$122.42. There was no default on the part of the plaintiff, which during the entire year was ready, willing and able to perform the services according to the contract.

On the 18th day of July, 1913, the remainder of the \$1500 (which was indisputably long overdue if the contract above quoted was of any validity) not having been paid, the plaintiff brought suit for it.

December 22, 1913, on an instructed verdict of the jury it was given a judgment for \$1452.48, which represents that balance of \$1377.58 and interest for something over 13 months at the legal rate.

We fail to see how any other result could have been justified. The defense stated in the affidavit of merits filed in the cause was that the plaintiff had failed to perform its part of the contract - a contention in support of which no evidence was offered, and which was entirely negatived by the evidence in behalf of the plaintiff.

The first defense actually relied on was that the written contract was never executed by the defendant. It is maintained that although signed "Sanitary Drinking Cup Co., Harry

Journal of Interpersonal Violence 26(12)

"W. Hahn, Secy. & Treas.", there was no proof that Hahn or the Secretary and Treasurer of the Company had any authority to sign any such instrument. As a corollary or supplement of this contention it is maintained that it was error on the trial below to exclude an offer to show by the by-laws and minute book of the corporation that the Secretary and Treasurer was not authorized to execute the contract. The offer was properly rejected because there was no such defense set up by the pleadings as the non-execution of the instrument sued on by the defendant, Sanitary Drinking Cup Company.

The general issue of non-assumpsit was pleaded by the defendant, but it was not sworn to. There was an affidavit of merits, but no affidavit verifying the plea or denying the execution. The affidavit of merits does not meet the requirement of Section 52 of the Practice Act in relation to denying the execution of an instrument sued on.

Hansen v. Hall, 44 Ill. App. 474.

The Section mentioned applies as well to an instrument purporting to have been executed by a corporation through an agent as to one executed by an individual.

Home Flax Co. v. Beebe, 48 Ill., 138;

Richlieu Hotel Co. v. Encampment Co., 140 Ill., 248, p. 266;

Firemen's Ins. Co. v. Barnsch, 161 Ill., 629.

This completely disposes of this defence and of the assignments of error based on it; but it may be said that under the facts admitted by the Company it was otherwise futile to make it. The Company acknowledged and acted under the contract and only ceased to do so when its funds gave out. Express authority to make it originally was, under the circumstances, not material.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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These findings have been well documented and the need should not be

NOT RECORDED BY THE OFFICE OF THE SECRETARY OF DEFENSE

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and the following are the results of the analysis:

**Wormholes* by Stephen Hawking, Bantam Books, \$17.95, 304 pp., ISBN 0-553-28036-7.

to note successive circles as we follow the spiral

13. J. H. P. van den Bergh, *Math. Ann.* **232**, 197 (1978).

Notwithstanding a 20-year history of publishing abstracts

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*Growth rate of the population: 1.0% per year (1990-1995); 1.0% per year (1995-2000)

Another alleged error seems to be that the amount due the plaintiff was less than the judgment, - that fifteen hundred dollars was "a penalty", or, if not a penalty, "liquidated damages" for the breaking of a contract, which should be chanceryized.

There is no question of a "penalty" or of "liquidated damages" in the case. The instrument promises to pay \$1500 for the services undertaken by Lord & Thomas as a minimum, and more if the commissions provided for aggregated more.

The only breach of the contract by the defendant was the refusal to pay Lord & Thomas what it owed to them.

The allowance of interest is objected to. It was properly allowed. It became due on "an instrument of writing" twelve months from its date.

The want of a seal in the instrument is apparently made a matter of objection to its validity. It needed no seal.

There is nothing really material urged in defense to this action or against the rulings of the Court below. The judgment is accordingly affirmed.

AFFIRMED.

ANNIE CURRAN,
Appellee,
vs.
PATRICK B. CURRAN,
Appellant.

APPEAL FROM THE SUPERIOR COURT
OF COOK COUNTY.

191 I.A. 160

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

The decree for divorce appealed from in this cause was granted for desertion and extreme and repeated cruelty. If it rested on the finding of cruelty alone, it certainly would be doubtful whether it could be properly sustained under the evidence. But despite the vigorous assertions of the defendant that the fault in the unhappy marital life of the parties was not his, but his wife's, and that he was justified in leaving her house and cannot be said to have deserted her, we think, as did the Court below, that the complaint of the petitioner as to desertion was made out. He left his wife on September 27, 1910, and never supported her or offered to support her afterward. So much is admitted. The bill was filed May 23, 1913, - more than two years thereafter.

As to the cause he had to leave, the parties do not agree, but the Chancellor below, having the parties before him, decided in favor of the complainant and we shall not interfere with his judgment.

The decree of the Superior Court is affirmed.

AFFIRMED.

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PASQUALE SCHIAVONE and
MICHAEL F. SCHIAVONE,
doing business as P.
SCHIAVONE & SON,
Appellees,

vs.

DONATO ZINGARELLI and
AMALIA ZINGARELLI,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

191 I.A. 167

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In an action in the Municipal Court tried without a jury, the plaintiffs, Pasquale and Michael F. Schiavone, had judgment against Donato and Amalia Zingarelli for \$1424.64, to reverse which the defendants prosecute this writ of error.

The grounds of reversal urged are, first, that the Court erred in admitting a certain ledger leaf in evidence; and, second, that the judgment is against the weight of the evidence.

The statement in the abstract that the ledger leaf in question was admitted in evidence over the objection of defendants, is not sustained by the record. The leaf was offered, admitted in evidence, and made a part of the record without objection on the part of the defendants. When this had been done defendants' counsel said: "I think these three ledger leaves are objected to." This was not an objection. No ruling of the Court was asked for or made and the judgment should not be reversed because of the admission of the ledger leaf in question.

Among the items sued on were twelve notes of the defendants to Bottigliero amounting to \$450. The Zingarellis employed Bottigliero to do work for them on a certain building, for which they were to pay him \$600. He was paid \$150 in cash and the notes in question for \$450 given him for the remainder of the contract price. Plaintiffs in error contend that the

1. The first part of the report is a summary of the work done during the year.

2. The second part is a detailed account of the work done during the year.

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19. The nineteenth part is a summary of the work done during the year.

roof of the building leaked after the work was done and that therefore there was a total failure of consideration. The consideration for the notes to Dettigliere was his promise to the Zingarellis to do certain work. If he did not keep his promise he was liable to them in damages, but such breach of his promise would not constitute a failure of consideration for the notes given him by the Zingarellis. Nor do we think that there was a clear preponderance of evidence that there was an accounting or accord which would prevent the recovery on these notes.

While the evidence is conflicting, we think that from it the Court might properly find that the defendants were indebted to the plaintiffs in the full amount of the recovery, and that there is no error of procedure sufficient to justify a reversal of the judgment, and it is therefore affirmed.

JUDGMENT AFFIRMED.

181 - 26105

M. H. JOHNSON, Trustee of the
Estate of T. F. MCKINLEY, Bankrupt,
Defendant in Error,

vs.

ARTHUR WEILHENFELD,
Plaintiff in Error.

BRANCH TO THE MUNICIPAL
COURT OF CHICAGO.

1911A.168

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment for the plaintiff McKinley against the defendant Weilhenfeld in forcible detainer entered on a directed verdict. Hannah and Hogg rented from the owner in 1905 the entire floor of a building and about 1906 leased to the defendant a portion thereof 15 X 58 feet, which he has since occupied. In 1909 Hannah and Hogg leased to Flanigan a portion of said floor adjoining the premises occupied by defendant on the south and east for a term of five years from May 1, 1910. Flanigan, with the consent of the lessors, assigned his lease to Bloom January 19, 1910. Bloom leased to defendant March 5, 1910, a space about 15 X 25 feet adjoining on the east the premises leased to and occupied by defendant. September 12, 1910, Bloom, with the consent of the lessors, assigned the Flanigan lease to Lane. The lease of the space 15 X 25 feet made by Bloom to defendant appears to have been cancelled by consent of defendant and Lane, and Lane, August 4, 1911, leased to defendant a portion of the space leased by Bloom to defendant, approximately 15 feet square, adjacent to the premises leased to defendant by Hannah and Hogg. April 27, 1912, Lane, with the consent of the lessors, assigned the Flanigan lease to Huggan. Huggan and McCarty occupied for a saloon the premises originally leased to Flanigan, with the exception of the 15 X 15

feet leased by Lane to defendant until in March, 1913, they lost their license. They paid the March rent and Hannah and Hogg sued Flanigan for the April 1913 rent and recovered. April 16, 1913, Hannah and Hogg leased to plaintiff McKinley for a term of two years from May 1, 1913, the premises originally leased by said lessors to Flanigan.

This action was brought by McKinley to recover from Weilchenfeld possession of the space 11 feet square adjoining on the east the premises 15 X 55 feet originally leased by Hannah and Hogg to defendant. The defendant in error has not filed a brief, but we think it appears that the Court directed a verdict for the plaintiff on the theory that the lease to Flanigan had been forfeited and that therefore the lease from Lane to defendant for the premises in controversy had become void and of no effect. The lease to Flanigan provides that :

"It is expressly agreed between the parties that to that, if default be made in the payment of the rent above reserved or any part thereof, or in any of the covenants and agreements herein contained, to be kept by the second party, it shall be lawful for the first party, or the legal representatives of said party, at any time thereafter, at the election of said first party, or the legal representatives thereof, without notice, to declare said term ended, and to re-enter said demise premises, or any part thereof, either with or without process of law, and the said second party, or any person or persons occupying the same, to expel, remove and put out, using such force as may be necessary so to do, and the said premises again to repossess and enjoy, as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants." * * * "And in order to enforce a forfeiture for non-payment of rent, it shall not be necessary to make a demand on the same day the rent shall become due, but a failure to pay at the place aforesaid, or a demand and a refusal to pay on the same day, or at any time on any subsequent day, shall be sufficient, and shall be deemed a forfeiture for non-payment of rent; and after such default and forfeiture shall be made, the second party and all persons in possession under him shall be deemed guilty of a forcible detainer of said premises under the statute."

The rent for April, 1913, was not paid when due and the failure to pay the rent when due by the express provision of the Flanigan lease constituted a forcible detainer.

Such an agreement is binding on the lessee and those claiming under him; so the action for forcible detainer will lie on the simple proof of the non-payment of the rent reserved.

Esper v. Hinchcliff, 131 Ill., 468.

Seilchenfeld has only the rights that Flanigan had, for his assignees could transfer only the rights derived from the Flanigan lease subject to the conditions and provisions of that lease, and the case stands as though there had been no assignment of the lease and the suit had been brought by Mc Kinley against Flanigan. It appears that at some time - whether before or after May 1, 1913, does not appear - Flanigan paid to Hannah and Hogg the April rent due under the lease to him; but the payment of rent accruing before forfeiture made after forfeiture does not effect the forfeiture. If there were any facts connected with the payment tending to show a waiver by Hannah and Hogg of the forfeiture, it should have been shown by the defendant. There is no such evidence in the record.

We think the Court did not err in directing the verdict, and the judgment is affirmed.

AFFIRMED.

WILHELMINE KERNMANN,
Defendant in Error,
vs.
ANTON ERNST and MARGARETHA
ERNST,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 171

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for damages for injuries suffered from being bitten by a dog belonging to defendants. Upon trial a jury found the defendants liable and awarded plaintiff \$200. Judgment was entered on the verdict.

The testimony showed that while plaintiff was looking for the defendant, Anton Ernst, upon the premises where he resided, for the purpose of inquiring of him concerning rooms for rent, she was bitten by the dog, which was chained near the entrance to the building into which plaintiff was going.

Defendants asserted nonliability on the ground that plaintiff was a trespasser, and also that she was guilty of contributory negligence. We are of the opinion that the jury reasonably could find from the evidence against both contentions.

Complaint is made of the court's instructions, but no objections to them were made upon the trial.

However, we hold that the amount of damages awarded was excessive. Plaintiff received a small bite on the leg, which healed without unusual delay. Her claim of resulting injury to one eye is hardly sustained by the evidence. She testified to nervousness and shock, which is not improbable. We think \$100 would be ample compensation for what she has

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suffered. If defendant in error will within ten days from this date file a remittitur of \$100 the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;

OTHERWISE REVERSED AND REMANDED.

2 - 19001

HENRY L. STEINKE,
Plaintiff in Error,

vs.

JULIUS RICHY,
Defendant in Error.

BRANCH TO MUNICIPAL COURT
OF CHICAGO.

1911 A. 172

MR. JUSTICE MESURRY DELIVERED THE OPINION OF THE COURT.

Plaintiff claims defendant owes him \$36 for money loaned and merchandise sold and delivered. Upon trial by the court the testimony of plaintiff in support of his claim was contradicted categorically as to each item by the testimony of the defendant.

The trial judge had better opportunity than have we to determine the facts from the conflicting stories. He evidently was of the opinion either that plaintiff had failed to prove his case by the greater weight of the evidence, or that defendant's story was more credible. We cannot say that his conclusion was wrong.

It is not error for the court trying a case to render a decision without requiring argument of counsel; and as to the suggestion that plaintiff was not allowed to make a motion for a nonsuit, it is sufficient to say that no attempt to make such a motion appears to have been made.

The judgment is affirmed.

AFFIRMED.



1901 1902 1903 1904 1905

The following table shows the results of the experiments conducted during the year 1901-1902.

TABLE I. - Results of the experiments conducted during the year 1901-1902.

The first series of experiments was conducted during the month of January, 1902. The results of these experiments are shown in the following table. The second series of experiments was conducted during the month of February, 1902. The results of these experiments are shown in the following table. The third series of experiments was conducted during the month of March, 1902. The results of these experiments are shown in the following table.

TABLE II. - Results of the experiments conducted during the month of January, 1902.

The first series of experiments was conducted during the month of January, 1902. The results of these experiments are shown in the following table. The second series of experiments was conducted during the month of February, 1902. The results of these experiments are shown in the following table. The third series of experiments was conducted during the month of March, 1902. The results of these experiments are shown in the following table.

TABLE III. - Results of the experiments conducted during the month of February, 1902.

The first series of experiments was conducted during the month of February, 1902. The results of these experiments are shown in the following table. The second series of experiments was conducted during the month of March, 1902. The results of these experiments are shown in the following table. The third series of experiments was conducted during the month of April, 1902. The results of these experiments are shown in the following table.

TABLE IV. - Results of the experiments conducted during the month of March, 1902.

The first series of experiments was conducted during the month of March, 1902. The results of these experiments are shown in the following table. The second series of experiments was conducted during the month of April, 1902. The results of these experiments are shown in the following table.

RICHARD E. SALTONSTALL et al., etc.,
Plaintiffs in Error,

vs.

GEORGE H. MEAD and the GEORGE
H. MEAD AGENCY, Inc.,
Defendants in Error.

)
) ERROR TO MUNICIPAL
) COURT OF CHICAGO.
)
)
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1911A.173

MR. JUSTICE McSHERLY DELIVERED THE OPINION OF THE COURT.

This is an action of distress for rent. Defendants claimed that the property levied upon was the sole property of the George H. Mead Agency, a corporation, and that no relation of landlord and tenant existed between this company and the plaintiffs. Upon trial, without a jury, the court found against the plaintiffs on the issue as to the right to levy the distress warrant and dismissed the suit as to the George H. Mead Agency. On the same date on which the distress warrant was levied the Mead Agency commenced replevin proceedings, in which the goods levied upon in the distress proceedings were delivered to it. By a stipulation both the distress proceedings and the replevin suit were heard by the judge of the Municipal Court to whom the distress proceeding had been assigned, the evidence being the same in both cases. The court found in the replevin suit that the right of possession in the property was in the George H. Mead Agency, the plaintiff. That proceeding is now pending on review in this court as case No. 19719, in which an opinion is filed this day.

Upon consideration of the facts we are moved to a conclusion contrary to that reached by the trial court. These facts are substantially as follows: In January, 1911, the premises occupied by defendants were leased to George H. Mead by a written instrument, for a term beginning May 1, 1911, and

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ending April 30, 1914. At the time of making this instrument George H. Mead occupied an office on the seventh floor of the same building (the Marquette Building), where he was engaged in the advertising business under the name of the George H. Mead Agency. In February, 1911, he caused his business to be incorporated under the same name, to-wit, the George H. Mead Agency. In this corporation George H. Mead subscribed for all of the capital stock except two shares, which were subscribed for by other persons but not paid for. By a resolution George H. Mead turned over to the George H. Mead Agency in payment of his subscription to its capital stock a certain amount of cash and the "assets and good will of the business heretofore conducted by me under the name of the George H. Mead Agency." Among these assets was the office furniture which was subsequently levied upon by the plaintiffs in this proceeding. The resolution further provided that the corporation was to assume all bills payable, consisting of the current bills. On or about May 1, 1911, Mead and the corporation took possession of the demised premises and the business was conducted as before, but under the name of the "George H. Mead Agency, Inc.," of which George H. Mead was the president and general manager. No other officers of the corporation or employees occupied or used any portion of the demised space. The monthly rental under the lease was thereafter paid regularly and continuously for some time by the George H. Mead Agency through its checks.

We hold that this conduct of the parties constituted an acceptance by the George H. Mead Agency Incorporated of the lease from plaintiffs to Mead, and the company became bound by its provisions. This is in accord with the decision in many cases involving a similar state of facts. Some of these cases

are, Chapin v. Foss, 75 Ill. 280; Oaks v. Oaks, 16 Ill. 106; Welsh & Co. v. Taylor, 142 Ill. App. 46; Taylor on Landlord and Tenant, sec. 19. Facts almost identical with the above were under consideration in Milligan v. Darlington Lumber Co., 145 Ill. App. 518, and what is stated in that opinion to be the law is directly applicable to the case before us. Other similar cases are McFarlane v. Williams, 107 Ill. 33; Webster v. Nichols, 104 Ill. 180.

Under the evidence and the law the trial court should have entered judgment against both defendants. The judgment of the trial court is reversed, and as there is no dispute about the amount due judgment will be entered in this court against both defendants for \$360.

REVERSED AND JUDGMENT HERE.

16 - 19718

FINDING OF FACT.

The court finds that the defendant, George H. Read Agency, a corporation, accepted the lease from plaintiffs to George H. Read and became bound by its terms.

17 - 19719

THE GEORGE H. READ AGENCY,
Defendant in Error,

vs.

RICHARD E. BARTONSTADT et al.,
Plaintiffs in Error.

BRANCH TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 176

MR. JUSTICE McSABREY DELIVERED THE OPINION OF THE COURT

This is the replevin suit referred to in the opinion this day filed in case No. 19718, and this court being of the opinion, as therein expressed, that the plaintiffs in that suit (who are the defendants in this suit) were entitled to judgment against the George H. Read Agency (plaintiff herein) and also entitled to the possession of the furniture under the distress warrant, the judgment of the trial court in this case is reversed.

REVERSED.

17 - 19719

FINDING OF FACT.

The court finds that plaintiff is not entitled to the possession of the goods and chattels mentioned in the affidavit of replevin and the writ of replevin herein.

EDWARD SMITH,
Defendant in Error,

vs.

CHICAGO CITY RAILWAY
COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1911 A. 180

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

This is an action to recover compensation for injuries received by plaintiff when the wagon he was driving was struck by one of defendant's street cars. Plaintiff had judgment for \$900.

The place of the accident was in Chicago at the intersection of 22nd street, which runs east and west, Ashland avenue, which runs north and south, and Blue Island avenue, which runs northeasterly and southwesterly, crossing this intersection diagonally. On a morning in August plaintiff was driving north on Ashland avenue approaching 22nd street. The car in question was west of Ashland avenue and coming eastward on 22nd street. When plaintiff reached 22nd street he drove in a northwesterly direction across the 22nd street tracks, intending to proceed westwardly on the north side of 22nd street. His two-horse wagon was heavily loaded with stone and he drove at a slow walk. There is testimony tending to show that as he started to cross the east bound tracks on 22nd street the street car was about 200 or 250 feet away coming at full speed, which did not slowen until the wagon was struck. There was also testimony that no bell or gong was sounded, also that the car ran by the point at the intersection where a number of passengers were waiting to board the car.

Defendant contends that plaintiff was guilty of contributory negligence and that there was no negligence in the management of the car. We are of the opinion that under the circumstances these contentions cannot be held as matters of law; that this was a typical and proper case in which the jury should pass upon the conduct of the motorman and of the plaintiff. If the jury believed, as it might with reason, that the motorman when over 200 feet away saw the heavily loaded wagon in the act of crossing the tracks, and made no attempt to diminish the speed of his car, we can see no force in the claim that the verdict of negligence is not justified. We also fail to see why the fact that plaintiff attempted to cross the tracks at this street intersection or that he did not whip his horses into faster speed as he crossed the tracks must compel the jury to find the plaintiff guilty of contributory negligence. Defendant had no rights on this crossing superior to those of plaintiff, and it is manifest that a heavily loaded wagon must move slowly. We hold that the verdict is fully supported by the evidence.

It is further claimed that the verdict is excessive. Plaintiff was thrown from the wagon and for a time apparently was unconscious. There was injury to the chest and knee. He testified he was confined to his bed thirty days. The knee was badly swollen. Certain functional disorders appeared which gradually diminished. It does not appear that the amount of the judgment is excessive.

It is argued that the evidence does not show that all of these disorders resulted from the accident, and it seems to be thought that there must be direct and specific evidence not only that the injury produced these ailments but also how the injury produced them. The decision in Chicago Union Traction Co.

v. May, 221 Ill. 530, is directly against the position of the defendant on this point. It is there held that it is proper practice to prove the condition of plaintiff's health at and prior to the time of the injury, and to follow that up by proof showing the physical condition after the injury, and leave it to the jury to determine the cause of the subsequent physical condition as a question of fact.

Complaint is made of a question put to the physician, Dr. Holstead, with reference to the existence of ailments which the physician could not see; but we think the question was within the reasonable limits allowed by cross-examination.

Other objections are made to the testimony of physicians, but considering all the evidence as to the character and extent of the injuries, we cannot say that errors, if any, occurring during the examination of the medical witnesses had any tendency to influence the jury to bring in a verdict for a larger amount than would be warranted by the undisputed facts in the case.

Complaint is made of statements made by the attorney for plaintiff in the course of his argument to the jury. Some of these statements were objectionable, as the court properly ruled. In a close case on the facts some of these remarks might be held as sufficient grounds for a reversal. In the present case, however, we are not inclined to hold that what was said worked to the disadvantage of the defendant.

There being no reason to disturb the verdict of the jury, and there appearing no reversible errors upon the trial, the judgment is affirmed.

AFFIRMED.

ANDREW GOYT,
Plaintiff in Error,

vs.

NATIONAL COUNCIL, KNIGHTS AND LADIES
OF SECURITY (a corporation),
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

1911A. 186

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This suit was brought by plaintiff on a beneficiary certificate issued by the defendant society on the life of Lattie Goyt, plaintiff's wife. The original certificate was issued December 19, 1906, and was at that time payable \$700 to the husband and \$300 to Elizabeth Spring, the mother of Mrs. Goyt. On August 27, 1908, the original certificate was returned to the defendant with a request from Mrs. Goyt to have the benefits all made payable to the plaintiff, thus leaving out the mother. Mrs. Goyt had been declared insane by the County Court on April 21, 1908, and this finding was in force when the certificate was changed. At the death of Mrs. Goyt the plaintiff claimed the entire proceeds of the certificate. Elizabeth Spring claimed the amount provided in the first certificate, on the ground that the insured was insane when the beneficiary was changed. The face value of the certificate at the time of the death of Mrs. Goyt was \$900. Plaintiff would not accept as full settlement \$675, being his proportion of the original certificate, and brought this suit for the whole amount.

The case has been tried twice. Upon the first trial the trial court directed a verdict for the plaintiff, but this was held to be reversible error by the Branch Appellate Court, opinion appearing in 170 Appellate Court Reports at page 377. Upon the first trial it was claimed by

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ATTORNEY GENERAL

WASHINGTON, D.C.

THE UNITED STATES OF AMERICA
vs. THE NATIONAL BOARD OF
FIREWORKS, INC.

1911-12-11

RECEIVED BY THE OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D.C.

THE UNITED STATES OF AMERICA
vs. THE NATIONAL BOARD OF
FIREWORKS, INC.

*Return by Andrew Boyd against National
Council, Fireworks and Sales of Fireworks, a corporation,
on a complaint returned by the defendant
on the basis of plaintiff's reply. The original*

plaintiff that the issuance of the second certificate, changing the beneficiary, was a new contract, and also that the defendant could not set up as a defense that Mrs. Goyt was insane. The Appellate Court held against plaintiff on both these propositions. The court also held that the evidence introduced by the defendant made at least a prima facie case that Mrs. Goyt was not sane at the time the change was made and that the burden of proof was thus shifted to the plaintiff to show that the change was made during a lucid interval. The law of the case being thus settled adversely to the contentions of plaintiff, the issue tried before the jury on the second trial was as to the sanity of Mrs. Goyt on August 27, 1908, at the time she directed defendant to issue the new certificate. The jury was of the opinion from consideration of the evidence before it that she was without sufficient mental understanding to transact business at this time, and a verdict adverse to plaintiff was returned upon which judgment was entered.

It is urged in this court by plaintiff that this verdict is contrary to the weight of the evidence. We do not agree with this contention. It is unnecessary to narrate the stories of the different witnesses, going into detail as they do with the conduct and appearance of Mrs. Goyt at and about the time in question. After having duly considered the entire testimony we see no reason to disturb the conclusion of the jury upon the question of the sanity of Mrs. Goyt.

Complaint is made of the conduct of defendant's attorney upon the trial; and in some respects some of the things said by him were objectionable, but nothing appears of sufficient seriousness to justify a reversal. From the very relations of the contending parties more or less feeling was to be expected.

Rulings of the court on the admissibility and competency of testimony are questioned, but errors in this respect, if any, are not sufficiently harmful to work a reversal in this case.

The sole issue being one of fact, we are not persuaded that the verdict of the jury was not justified, and the judgment is affirmed.

AFFIRMED.

THESE ARE THE RESULTS OF THE INVESTIGATION
CONDUCTED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE
IN 1881, AND ARE THE BASIS OF THE REPORT
HEREIN. THE RESULTS OF THE INVESTIGATION
CONDUCTED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE
IN 1881, AND ARE THE BASIS OF THE REPORT
HEREIN. THE RESULTS OF THE INVESTIGATION
CONDUCTED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE
IN 1881, AND ARE THE BASIS OF THE REPORT
HEREIN.

(SIGNED)

SOLOMON SEGAL,
Defendant in Error,
vs.
JOSEPH GOLDBERG,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

191 I.A. 188

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit by a lessee of a building against the lessor for the return of a deposit of \$350, which, by the terms of the lease, was to be held by the lessor until the termination thereof as security for the purpose of indemnifying the lessor for the removal of the front of the building, and was to be returned with 3% interest per annum unless the lessor failed to restore the said front "at the expiration of the lease," in which event it was to be retained as fixed and liquidated damages.

The lease also provided for a penalty of \$10 each day the tenant held over. The case was tried before the court without a jury and there was a finding and judgment for \$235.

The judgment, defendant prosecutes a writ of error.
The testimony tended to show that at the expiration of the lease, the lessee offered to make the restoration but was deterred from so doing by the lessor, that the cost of restoration would have been \$150, and that the lessee surrendered the keys five days after the lease expired. The court evidently arrived at its finding by deducting from the amount of the deposit and 3% interest thereon to the date of the expiration of the lease the estimated cost of restoring the building and \$50 for holding over, thus leaving \$200 on which the statutory interest to the date of judgment was \$35. The computation seems to have been correct and that is about the only question of fact in the case.

The argument for plaintiff in error is predicated al-

277-1111

Return by Solomon Siegel against Joseph Goldberg
for the return of \$300 alleged to have been deposited
with defendant under the terms of a lease by which
said sum was to be held by defendant, as lessor, until
the termination of said lease as security.

most entirely upon the claim that the damages were uncertain. The only competent evidence on the estimated cost of restoring the building was offered by plaintiff which from its very nature could be computed with approximate certainty, thereby justifying the court in treating the deposit as a penalty rather than liquidated damages. The judgment will be affirmed.

AFFIRMED.

THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
E. H. ALLEN,
Defendant in Error.

Error to
Municipal Court
of Chicago.

191 I.A. 189

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury, defendant in error was acquitted of the charge of disorderly conduct in violation of one of the ordinances of the city. The same charge was also preferred and prosecuted at the same time against one Charles E. Belleck, growing out of the same occurrence, and with the same result. The evidence and questions being the same in both cases, they have been consolidated in this court for hearing.

We have carefully examined the entire testimony and cannot say that the court's findings were manifestly against the weight of the evidence. Its weight depended mainly upon the credibility of the witnesses, which the court had a far better opportunity to determine than we have.

Plaintiff in error complains that the court limited the number of witnesses. No objection was taken to the court's suggestion to that effect, but, on the contrary, counsel for plaintiff in error appears to have acquiesced in it.

Criticism is well taken to the fact that the court took judicial notice of the bad character of a place in which one of the witnesses at one time worked, but we do not think the error was such as would justify our remanding the case for a new trial. The material fact in controversy was as to who were the aggressors

in a fight that took place between waiters in a public resort and said Allen and Belleck. Giving due weight to the testimony

of the witness whose reputation was thus attacked, we would still regard the main question of fact as such a matter of doubt that we could not disturb the court's findings.

AFFIRMED.

CITY OF CHICAGO,
Plaintiff in Error,
vs.
CHARLES A. SELLECK,
Defendant in Error,

} Error to
Municipal Court
of Chicago.

191 I.A. 191

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with No. 30006, City of Chicago vs. Allen, involving the same questions. For the reasons stated in our opinion filed in the latter case, the judgment below will be affirmed.

AFFIRMED.

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO

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THE UNIVERSITY OF CHICAGO

A. YUCKMAN,
Defendant in Error,
vs.
J. J. CONSIDINE,
Plaintiff in Error.

}
Error to
Municipal Court
of Chicago.
}

191 I.A. 192

MR. PRESIDING JUSTICE PARKER DELIVERED THE OPINION OF THE COURT.

Plaintiff below sued defendant for commissions claimed to have been earned by him under a verbal agreement with the latter to procure a purchaser ready, willing and able to buy certain real estate owned by defendant's mother. One of the questions at issue was whether plaintiff knew at the time of entering into such an agreement that defendant was negotiating in the capacity of agent or whether that fact was concealed from him. The same question of fact was raised on a former trial and, upon a review thereof by this court, a judgment against the defendant was reversed and the cause remanded, because, among other reasons, the court refused to instruct the jury that if the jury believed from the evidence that defendant was not the owner of the property, nor authorized to sell or offer it for sale, and the plaintiff to know prior to his negotiations with a prospective purchaser, then he could not recover. (See 173 Ill. App. 613.)

Upon the second trial, now under review, the same question of fact was in controversy, there being evidence tending to show that plaintiff knew that defendant was dealing in the capacity of agent only, and yet the court again refused to give a like instruction. No other instruction covered the subject from the point of view of defendant's theory of the case. It ought not to be necessary to bring the same case to this court twice on the same point

of law applicable to the same state of facts. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

A. YUCKMAN,
Defendant in Error,
vs.
J. J. CONSIDINE,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment for \$875 for commissions claimed to have been earned by plaintiff below as a broker in procuring a would-be purchaser, ready, willing and able to pay an agreed price for certain real estate owned by defendant's mother.

It appears that Yuckman, plaintiff below, went to the office of Considine, defendant below, and asked him if the property was for sale and obtained a price thereon, and subsequently brought two parties to defendant's office and that they made an offer of a less sum, which was rejected. Plaintiff claimed that defendant agreed to pay him 2-1/2 per cent. commission, and that the parties he was negotiating with subsequently accepted defendant's terms but defendant would not close the deal. On the other hand, defendant claimed that on plaintiff's first visit he told him the property was for sale, and that his mother and not he was the owner thereof; that after the offer aforesaid was rejected, plaintiff requested him to see if his mother would not take a less sum, and that he did not see plaintiff thereafter until he came claiming a commission.

Three important matters were in dispute: (1) The terms of sale; (2) whether defendant personally promised to pay a commission fee; (3) whether he held himself out as the owner or as authorized to sell.

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In an instruction on the last matter, as to which there was a clear preponderance of the evidence in defendant's favor, the court said:

"The question of ownership of the property is altogether immaterial; that is, if you should find from the evidence in the case that the defendant held himself out to be the duly authorized agent of the owner of the property, and that he had the proper authority to sell this property, then he would be liable whether or not he owned the property."

Thereupon defendant requested the court to instruct as follows:

"The court instructs the jury that if you find from the evidence that the defendant, J. J. Conscience, was not the owner of the real estate in question, and was not authorized by the owner thereof to sell or offer the same for sale, and that the plaintiff had knowledge of this fact prior to or at the time he began negotiations with the prospective purchasers, he cannot recover, and your verdict must be for the defendant."

The court refused so to instruct the jury and defendant excepted thereto and to that part of the ^{given} instruction saying that the ownership was immaterial. *In answer to judgment in favor of plaintiff, defendant's proposition was*

The ownership of the property was immaterial if defendant personally agreed to pay the commissions or held himself out as owner, but was material for the jury's consideration as supporting the defense stated in the refused instruction, that plaintiff knew defendant was merely acting as agent for the owner. If the jury believed plaintiff's evidence that there was a personal promise by defendant to pay the commission, then defendant was liable on such promise even though he did not hold himself out as the owner and divulged the facts as to ownership. but if they believed defendant's evidence, which tended to negative such a promise and to show that he was acting merely as an agent and that defendant knew it, then the given instruction was misleading, especially as defendant's theory of the case was not given, and no instruction was given as to the effect of a personal promise.

Appellee calls attention to the cause of Sadler v. Young, 75 Atl. 890, and Payne v. Twitchell, 81 Id. 350. But each

was decided upon an unquestioned express promise in writing by the agent himself to pay commissions, the court holding that it was not necessary to the validity of such a contract that the promisor should be the owner of the land but that he was liable by reason of his personal agreement to pay the commission. Where, as in this case, the fact whether defendant made a personal promise to pay the commissions and the fact whether plaintiff did not know that defendant was merely acting as an agent in the transaction were controverted, and the jury were instructed that ownership of the property was "altogether immaterial" without being given the theory of the defense which made it material, the jury may have deemed defendant liable for the commissions even though he made no personal promise to pay them, and even though plaintiff knew he was merely acting in the capacity of agent.

The judgment, therefore, will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

338 - 20273

HARRY A. SELL,

Appellant,

vs.

CHARLES H. FISK,

Appellee.

Appeal from
Superior Court,
Cook County.

191 I.A. 194

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages for personal injuries, in which, at the close of plaintiff's case, the court, on the motion of defendant, excluded the testimony and directed a verdict because of the insufficiency of the declaration. Error is well assigned to such action of the court as it is a settled rule of practice that the sufficiency of a declaration cannot be tested in that manner, even though it be fatally defective; for, by pleading to the merits the defendant admits its sufficiency and elects to proceed to the trial of an issue of fact. (Klofski v. R. B. Supply Co., 238 Ill. 146; Swift & Co. v. Rutkowski, 182 Id. 18.)

True, as stated by appellee, a defendant by pleading does not waive substantial defects in the declaration, and may take advantage thereof by a motion in arrest of judgment. But the fact that he may do so does not affect the rule above stated.

Appellee claims that the motion to direct the verdict was, nevertheless, properly given as the evidence showed contributory negligence on the part of plaintiff. It was also open to the inference that plaintiff was in the exercise of ordinary care for his own safety, and, therefore, presented a question of fact for the jury to determine. This is true notwithstanding the declaration does not allege the exercise of such care for the verdict might cure

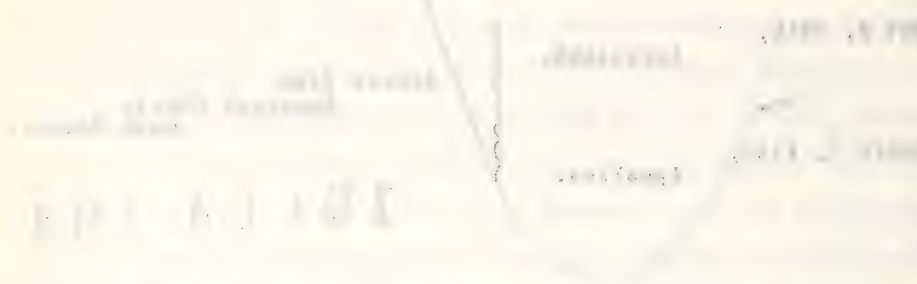


Diagram illustrating the lateral and medial aspects of the structure shown.

This diagram illustrates the lateral and medial aspects of the structure shown.

Between the lateral and medial aspects, the structure is divided into two main parts. The lateral part is characterized by a series of small, rounded protrusions, while the medial part is more elongated and tapers towards the bottom. The overall shape is somewhat irregular, with a distinct curve on the left side. The diagram is drawn in a simple, schematic style, using black lines on a white background.

The diagram is labeled with 'Lateral' on the left and 'Medial' on the right.

The structure shown is a cross-section of a biological specimen.

The lateral part of the structure is more prominent than the medial part.

The diagram is drawn to scale, with the lateral part being approximately twice as wide as the medial part.

The structure is shown in a cross-section, allowing for a clear view of its internal features.

The lateral part of the structure is composed of several small, rounded units.

The medial part of the structure is more continuous and elongated.

The diagram is a clear and concise representation of the structure's morphology.

The structure is shown in a way that highlights its key features and differences between the lateral and medial aspects.

The diagram is a valuable tool for understanding the structure's anatomy and function.

The structure is a complex and fascinating biological specimen, and this diagram provides a detailed look at its internal structure.

that defect. (Chicago City Ry. Co. v. Cooney, 196 id. 486.)

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED

20346
408-20346

WILLIAM J. SANDBERG, as Admin-
istrator of the Estate of GEORGE
ROBERT SCHIRMER, Deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

Appeal from
Superior Court,
Cook County.

1911 A. 199

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$4,000 rendered in an action to recover damages on account of the death of one Schirmer, resulting from a collision with one of appellant's street cars while running on its west tracks south on Sedgwick street, Chicago, December 31, 1911, after dark, at or near what would be the north line of their intersection if West Beethoven Place, which enters Sedgwick street from the west, crossed the latter and was extended east.

The case was submitted to the jury on plaintiff's evidence alone, defendant offering none but relying on the insufficiency of plaintiff's evidence to show either negligence on its part or the exercise of due care by deceased. *So removed a judgment in favor of plaintiff on the facts presented.*

The deceased had just left his wife on the east sidewalk of Sedgwick street to go to a store next to the building on the northwest corner of the two streets. A cold wind was blowing from the north and the deceased was walking with his head down as testified to by his widow. She last saw him at the first rail of the east tracks while so walking, and said that when he left the sidewalk, the car was about two hundred feet north. She did not see the collision and the testimony of the only witness who did throws little light on the main questions. A passenger on the car testified that he felt the brakes put on suddenly and a jolt immediately after-

*Place returned to
Callaghan & Co.
when Lindebeck
into this opinion*

wards. Another testified that the car was going slower and slower before the collision. The several witnesses testified that they heard no bell, and that the car was going at the rate of about six or eight miles an hour.

It can probably be said that there was evidence tending to show negligence on the part of defendant in failure to give warning of the approach of the car and, perhaps, failure to make a timely effort to stop it, and that there was some evidence, though meager, from which the exercise of ordinary care by deceased for his own safety might be inferred, although the contrary might also be inferred from the fact that he walked across the street with his head down when he could readily have seen and heard the car as did the witnesses for plaintiff who were about the same distance from it at the time of the accident; but no witness appears to have seen enough of his movements to tell whether he walked fast or slow in an effort to avoid a collision. The only evidence that could be said to relate to his movements was that given by his widow, who said, "He did not run across the street," but when asked whether he walked fast or slow, replied, "He goes fast always," which might indicate what was his usual habit rather than how he was moving on the occasion in question. If, as the evidence indicates, he had only about thirty feet to go during the time the car was going approximately two hundred feet at the rate of six or eight miles an hour and he walked as slowly as two miles an hour, - one-third or one-quarter as fast as the car, - he would have reached the point of danger before the car unless he stopped or the speed of the car was quickened, as to which there was no direct evidence. With no obstruction to a view of the car, he was chargeable with the exercise of due care in crossing the street and looking out for a car, and the motorman with the exercise of due care in looking out for pedestrians and warning them of the car's approach. Inasmuch as the evidence on these points was so close and in some respects so meager as to leave

much that was essential for inference, the jury should have been instructed with the greatest care and the reserves of counsel should have been kept within proper restrictions.

The court refused to give the following instruction requested by defendant:

"The court instructs you that the mere happening of an accident, together with proof of the exercise of ordinary care by the deceased, does not raise a presumption of negligence on the part of the defendant. The court further instructs you that plaintiff must prove the negligence alleged in his declaration or some count thereof by a preponderance of the evidence before he can recover against the defendant."

We think this instruction should have been given because there was much danger that the jury might supplement the meagerness of the evidence with such a presumption, and the danger of so doing was increased by the character of the argument made to the jury by plaintiff's counsel. Specific objection was made to his alluding therein to the fact that the defendant, though pleading not guilty, had not produced as witnesses persons, whom his counsel in his opening statement, said were on the car and knew how the accident happened. The court overruled the objection to which exception was taken and plaintiff's counsel proceeded to dwell upon the fact, comparing the attitudes of the two sides in respect to producing witnesses to the occurrence, and later saying that defendant was afraid to put its motorman on the witness-stand for cross-examination. This, too, was objected to and the court overruled the objection, thus encouraging plaintiff's counsel to argue in effect that defendant was guilty because it did not call witnesses in its power to produce.

This was not fair nor proper argument and should not have been permitted, especially after objection thereto. The approval of such argument by the court warranted an inference by the jury that defendant's proof, if introduced, would be unfavorable to it. A given instruction to that effect, where no testimony was offered by defendant, was deemed manifestly prejudicial in Smith v. Chi. C. Ry. Co., 185 Ill. App. 190. A refusal of the court in

Simon v. Griffin Wheel Co., 188 Id. 533, to instruct the jury that they would not be warranted in drawing any inference against the defendant from the mere fact that it offered no evidence to the jury, was held error, especially as the court remarked, in refusing the instruction, that the jury were "permitted to draw such inference." The court's approval of such argument by overruling the objections thereto was quite as prejudicial as the approval given by instruction in the former cited case, and by the remarks made in the latter. Defendant had the privilege and right to stand upon its plea and rely upon the fact that the cause of action was not established by the evidence offered on the part of plaintiff (Condon v. Schoenfeld, 214 Ill. 435), and as stated in Pietach v. Pietach, 245 Id. 454, "if the parties have a right to trial by a jury on the issues made by the pleadings, the verdict must rest upon evidence or want of evidence and not upon opening statements."

At defendant's request, the court instructed the jury "that the fact that the defendant has introduced no evidence by way of defense is not to raise a presumption in your mind of the guilt of said defendant;" but, in the present case, that instruction did not cure the mischief done by that kind of argument. As stated in Appel v. Chi. C. Ry. Co., 259 Id. 561:

"The rule in this state must be regarded as settled that misconduct of counsel of the character mentioned is sufficient cause for reversing a judgment, unless it can be seen that it did not result in injury to the defeated party. The questions to be determined are, therefore, whether the improper argument was of such a character as was likely to prejudice the defendant, and if so, was the verdict so clearly right that a new trial ought not to be granted because of such prejudicial argument."

In the present case we cannot say that the verdict was so clearly right that the new trial ought not ^{to} have been granted because of such prejudicial argument. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

The first of these is the fact that the
 system is not a simple one, but a
 complex one, involving many factors
 which are not easily understood or
 explained. The second is the fact
 that the system is not a simple one,
 but a complex one, involving many
 factors which are not easily under-
 stood or explained. The third is the
 fact that the system is not a simple
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 understood or explained. The fourth
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 easily understood or explained. The
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 easily understood or explained. The
 sixth is the fact that the system is
 not a simple one, but a complex one,
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 easily understood or explained. The
 seventh is the fact that the system
 is not a simple one, but a complex
 one, involving many factors which are
 not easily understood or explained.

417-20357

HYDRAULIC-PRESS BRICK CO.,
Appellant,

vs.

SAMUEL MIDLER et al.,
Appellees.

}
Appeal from
Circuit Court,
Cook County.
}

191 I.A. 201

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant's bill of complaint herein prayed for a mechanic's lien on the premises of Samuel Miller in Chicago, known as 3740-3746 Fullerton avenue, and this appeal is from a decree denying same and dismissing the bill for want of equity.

Miller, the owner of the premises, entered into a contract with one Warshavsky by which the latter agreed to construct and deliver buildings on said premises free and clear of all liens, waiving all right thereto under and by virtue of the mechanics' lien act; hence if appellant was a sub-contractor, the waiver of all liens by the original contractor prevented it from asserting one (Kelly v. Johnson, 251 Ill. 135), and the facts presented by the record do not justify the claim that appellant was a general contractor.

It appears that Warshavsky applied to appellant for brick to be used in the building. Thereupon appellant wrote Miller as follows:

"Dear Sir:

Mr. Louis Warshousky has placed an order with us for: (here follows the amount and price of the brick required) - to be delivered to your property 3742-6 Fullerton Avenue. We do not know very much about Mr. Warshousky's financial responsibility and do not wish to do him any injustice, but before accepting this order, we wish to inquire whether you will agree to see that our account is paid before final settlement is made with Mr. Warshousky.

Please kindly let us hear from you by return mail, so as not to delay the delivery of the brick.

Very truly yours,
Hydraulic-Press Brick Company."

The next day, (Sept. 10th), Miller replied:

~~Call by Hydraulic Press Brick Company making
your mechanics then to the premises of Samuel
Miller to receive a degree, describing the
as you want a copy of, complaint appears.
It appears that Miller~~

"Gentlemen:

Kindly send the bricks for my building at 3740-6 Fullerton Av. as per receipt of your letter of the 9th inst. and oblige,

Yours truly,

Samuel Miller."

It is clear from the foregoing that Miller merely agreed to see that the brick appellant might sell Warchavsky would be paid for out of any moneys that might be due him on a final settlement. At most, Miller's undertaking was that of a guarantor to the extent of moneys that might be so due and was not a contract on his part to pay for the brick in any event. The Hydraulic-Press Brick Company was unquestionably a sub-contractor only and accepted the general contractor's order after getting said guaranty. The decree, therefore, will be affirmed.

AFFIRMED.

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

THE UNIVERSITY OF CHICAGO
LIBRARY

20803

471 - 20803

THE PEOPLE OF THE STATE
OF ILLINOIS,

Appellee,

vs.

BOWMAN DAIRY COMPANY, a
corporation,

Appellant.

Appeal from
County Court,
Cook County.

191 I.A. 203

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This being a criminal case, in which no appeal lies,
and there having been no joinder in error or the equivalent there-
of, on appellee's motion the appeal is dismissed. (French v. The
People, 77 Ill. 531; Ferriss v. The People, 71 Ill.App. 334.)

APPEAL DISMISSED.

B. J. REGNELL CO.,
Appellee,

vs.

RICHARD A. MEISWINKEL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

1911 A. 238

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This action was brought by the plaintiff upon a contract in writing, a copy of which is attached to the amended statement of claim. The plaintiff's contract was to do the carpenter work on a building for \$21,900; payments were to be made upon architect's certificates, and the contract provided that no certificate, except the final certificate, should be conclusive evidence of the performance of the contract. The plaintiff averred in its amended statement of claim that it had secured a final architect's certificate in the sum of \$2838, and attached a copy of the same thereto, and in addition averred that it had furnished certain extras amounting to \$526.56, an itemized statement of which was attached to the statement of claim. The plaintiff further averred in its statement of claim that when the architect's certificate with a bill for the extras was presented to the defendant, he paid \$1500 on it and retained the certificate and refused to return it, and that he still retains it in his possession. Plaintiff's claim was for \$1,338, balance due under the certificate and \$526.56 for extras, together with interest at the rate of 5% per annum from August 7, 1912, the date of the certificate. The statement of claim was duly sworn to on behalf of the plaintiff.

To this amended statement of claim the defendant filed an affidavit of merits, and after being ruled to do so,

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filed an amended affidavit and an amended statement of set-off. Upon motion of the plaintiff the court struck out certain parts or paragraphs of the amended affidavit of merits and the amended statement of set-off, and the defendant, having elected to stand by his amended affidavit of merits and the amended statement of set-off, the court entered judgment in favor of the plaintiff against the defendant for the sum of \$1540.89, and ordered that as to the balance of plaintiff's claim and interest on its entire claim or part thereof, the cause should proceed to a trial.

The defendant prosecutes this appeal to reverse the judgment. The errors assigned relate to the striking out of the paragraphs or portions of the amended affidavit of merits and statement of set-off, and to entering a judgment against the defendant.

The parts of the amended affidavit of merits stricken out by the court relate to a denial of the performance of the contract by the plaintiff in accordance with the provisions thereof, and a denial that the plaintiff complied with the provisions of section 7 of the contract with reference to presenting its claim in writing to the architect within 48 hours after the occurrence of delays, and failure to make any proper claim for an allowance for the delays as provided in said section, and for damages resulting from the plaintiff's failure to comply with the contract and finish the work in the time specified in the contract.

The provisions of the contract necessary to be considered in determining the assignments of error are articles III, VI, VII, X, and XII.

Article III provides that no alterations shall be made in the work except upon the written order of the architect,

and the amount to be paid by the owner or allowed by the contractor by virtue of such alterations was to be stated in the order. It was further provided in that article that should the owner and contractor not agree as to the amount to be paid or allowed, the work should go on under the order required above, and in case of failure to agree, the determination of the amount to be paid or allowed should be referred to arbitration as provided in article XII of the contract.

Article VI provided that the work described in the contract was to be completed on or before November 30, 1911, subject to the provisions of the contract.

Article VII provided that if delay of contractor in the prosecution or completion of the work was caused by the act, neglect or default of the owner, of the architect, or of any other contractor employed by the owner upon the work, or by any damage caused by fire or other casualty for which the contractor was not responsible, or by combined action of workmen in nowise caused by or resulting from default or collusion on the part of the contractor, then the time fixed for the completion of the work was to be extended for a period equivalent to the time lost by reason of any or all the causes above mentioned, which extended periods should be determined and fixed by the architect, but that no such allowance should be made unless a claim therefor was presented in writing to the architect within 48 hours of the occurrence of such delay.

Article X provided that no certificate given or payment made under the contract, except the final certificate or final payment, should be conclusive evidence of the performance of the contract, either wholly or in part, and that no payment should be construed as an acceptance of defective work or improper materials.

Article XII of the contract provided that in case the owner and contractor failed to agree in relation to matters of payment, allowance or loss referred to in articles III or VIII of the contract, or should either of them dissent from the decision of the architect referred to in article VII of the contract, the dissent should be filed in writing with the architect within ten days of the announcement of his decision and that the matter should be referred to a board of arbitration, and provides how that board is to be selected.

The amended statement of claim filed by the plaintiff contains very full averments of the facts as to what was done in the execution of the contract and the ordering of extra work by the defendant and the agreed amount charged therefor, and sets out an itemized statement of extra work amounting to \$526.66, which was not agreed upon. The amended statement of claim avers the issuance of the architect's certificate for \$2838, and that it was a final certificate of what was due plaintiff under the original contract and upon the claim of the plaintiff for the extras, the value of which had been agreed upon beforehand; the presentation of the certificate of the architect to the defendant for payment, and also the presentation therewith of the bill for extras, and it avers that the defendant retained the architect's certificate and refused to return it to the plaintiff and that the defendant on August 13, 1912, paid the plaintiff on the architect's certificate the sum of \$1500.

Upon the averments contained in the plaintiff's amended statement of claim and the admissions contained in the affidavit of merits with reference to the issuance of the final certificate of the architect and the payment thereon by the defendant of more than half of the amount for which the certificate was given, and the retention by the defendant of the certificate

THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT
FROM: SAC, DENVER (100-444444)
SUBJECT: [Illegible]

[Illegible text follows]

without any dissent from the decision of the architect for the period of more than a year prior to the commencement of the suit, it is clear that the matters stricken out of defendant's affidavit of merits and his statement of set-off constituted no answer to the plaintiff's case as made in its statement of claim. These averments of the statement of claim show that the plaintiff was delayed in the progress of its work by other contractors over whom the plaintiff had no control, and that the defendant and his architect had full knowledge of the condition of the work at all times, and the delay, and that defendant and his architect permitted the plaintiff to proceed to the completion of its contract, which it did with all due and reasonable speed and diligence. The plaintiff was, therefore, confessedly allowed by the defendant to proceed with its work after the time fixed for its completion. The defendant did not avail himself and does not pretend to have availed himself in his affidavit of merits of his right under the contract to provide either labor or material for the purpose of promoting the completion of the work. Under such circumstances, the defendant waived his right to object or claim damages for the delay in completing the work on time. He is not now in position to say that the plaintiff must be held responsible for the delay in completing the contract. As said in *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, at page 630 of the opinion:

"Where the delay is caused by extra work directed by the owner and the architect, the contractor cannot be held liable therefor. Neither can he be held liable when he is allowed to proceed with the work after the time fixed for its completion, where the owner accepts the work after it is completed and makes payment without raising any question as to the delay. Literal compliance with the provisions of a contract is not essential to a recovery. It will be sufficient if there has been an honest and faithful performance of the contract in its material and substantial parts and no wilful departure from or omission of the essential parts of the contract. To permit appellant to claim liquidated damages

under this contract, under the circumstances shown by this record, 'would be, in our opinion, contrary to the law and abhorrent to reason and justice.'" (Hartford Deposit C. v. Calking, 186 Ill. 104; Evans v. Howell, 111 Id. 85; Paster v. McKeown, 192 Id. 339).

See also to the same effect Walton v. North American Storage Co.,

260 Id. 322.

While it is true that in one part or paragraph of the affidavit of merits stricken out by the court, it is stated "that the defendant also denies that the plaintiff was prevented from completing its work or performing its contract by reason of the delay of the other contractors, still the defendant avails in his affidavit of merits a denial of the plaintiff's allegation that the plaintiff was prevented by the delay of the other contractors from completing the contract in the time set for its completion, November 30, 1911, and that on that day it had by reason of such delay been able to do less than one-third of the work provided in the contract, and that this fact was then well known to the defendant and the architect. Giving this denial a most liberal construction, it does not present a defense to the plaintiff's statement of claim for the reason that the defendant's architect, who knew all the facts, issued his final certificate, and the defendant accepted the final certificate and made a payment of \$1500 thereon, without any dissent or objection to the work or to the certificate. There is no statement in the affidavit of merits that the architect in executing and delivering the certificate to the plaintiff was actuated by any improper motives or that he did not have the authority to pass upon the plaintiff's claim under the original contract, or the extension of time for the performance of the contract.

The law is well settled that where the contract provides that the architect's final certificate shall be conclusive evidence of the performance of the contract, such certificate in an action of assumpsit brought thereon is conclusive

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evidence unless it is shown that it was obtained by fraud or mistake. (Garber v. Windlay, 231 Ill. 251; Weld v. First National Bank, 256 Id. 43).

The contract in this record provided "that no certificate given or payment made under this contract, except final certificate or final payment, shall be conclusive evidence of the performance of this contract." This is the exact language of the contract used in in Concord Apartment House v. O'Brien, 228 Id. 360, and the court there held that the final certificate by the architect was conclusive evidence of the performance of the contract and could be overthrown only by proof of fraud or mistake.

The averments stricken out by the trial court from the affidavit of merits and set-off, were, therefore, no answer to the plaintiff's claim based upon the original contract, and that part of the extras for which compensation had been agreed upon, and constituted no ground of set-off thereto. The admissions contained in the amended affidavit of merits made it unnecessary for the plaintiff to introduce any evidence to sustain the judgment appealed from. The court was authorized, by sections 35 and 36 of the Practice Act, to enter judgment as by default for the amount of the plaintiff's claim, which was included in the judgment, and order the case to proceed to trial as to the balance of the plaintiff's claim.

We find no error in the record and the judgment is affirmed.

AFFIRMED.

Wojcikowski
PAULINA SHARMACH WOJCIKOWSKI,
Appellee.

vs.

NATIONAL COUNCIL OF THE KNIGHTS
AND LADIES OF SECURITY,
Appellant.

APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

191 I.A. 254

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This suit was brought on a fraternal beneficiary certificate issued by the defendant society, appellant here, to one Francis Sharmach, payable to his wife, the plaintiff, appellee here, in the sum of \$2000. The application for the certificate was made June 27, 1910. The certificate was issued July 9, 1910. The insured died October 19, 1910.

The statement of claim sets out a copy of the beneficiary certificate and alleges the death and making of proofs of loss and that all requirements were complied with on the part of the member and the beneficiary.

The affidavit of merits, among other things alleges that the applicant had falsely stated in his application that he never had any disease of the liver and that he was in sound physical condition and a fit subject for life insurance; that he had not been intoxicated during the year previous to making the application and that he had never been addicted to the excessive or intemperate use of any liquors, and that he became and was intemperate after his admission to said society, and that his death resulted directly or indirectly from the intemperate use of intoxicating liquors, and that he had falsely stated in his application that he was a welder, and falsely stated that he had not had any illness during the five years preceding the making of application requiring the services of a physician or surgeon.

The beneficiary's certificate, which was offered in evidence, provided in part as follows: that it was issued by the National Council and accepted by the member only upon the following express warranties, conditions and agreements:

"1. That the application for membership in this Order, made by the member together with the report of the medical examiner, which is on file in the office of the National Secretary, and both of which are made a part hereof, are true in all respects, and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of the Order to said member, or said member's beneficiaries, the same as if fully set forth in this certificate.

"2. That if said application and medical examination shall not be true in each and every part thereof, then this beneficiary certificate shall as to said member, or said member's beneficiaries, be absolutely null and void.

4. If the member holding this certificate shall be expelled from this Order, or become intemperate in the use of alcoholic drinks, narcotics or drugs, * * * then this certificate shall be null and void, and all money which has been paid into the reserve fund, beneficiary fund, or national council general fund, and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited.

6. This certificate and contract is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the laws of the Order, or for any other cause or causes for forfeiture which may be hereafter prescribed by this Order by the amendment of said laws."

The application offered in evidence on behalf of the defendant was in part as follows:

"1. Your full name? (Do not use initials for first name.)
Francis Shammach.

6. (a) What is your business or occupation? Molder.

(b) What are the specific duties of your occupation? (Be explicit in your answer.) Note above ans.

(c) Have you any other business, employment, or occupation, either regularly or occasionally? No.

(d) If yes, what?

10. Have you now or have you ever had any of the following diseases or symptoms of any disease of the following named organs? (Answer yes or no to each. Bitte marks not accepted.)

Delirium tremens. No.

Liver (disease of). No.

Palpitation of the heart? No.

12. (a) Do you drink wine, spirits, or malt liquors, daily or habitually? Only beer.

(b) If so, state what you drink, and daily average amount? And he says he does not average over two glasses a day.

13. (a) Have you ever been addicted to excessive or intemperate use of any liquors? No.

(b) If so, when?

14. Have you ever taken treatment for the liquor habit? No. If so, when?

18. If intoxicated, during the last year, how many times? He says never.

20. (a) Have you had any illness, constitutional disease or injury during the past five years requiring the services of a physician or surgeon? No. (b) If so, give full particulars.

I hereby certify that I am temperate in my habits, and am in sound physical and mental condition, and that I am a fit subject for life insurance.

I hereby make application for a beneficiary certificate from the National Council of the Knights and Ladies of Security. And I hereby declare that the foregoing answers and statements and the answers to the questions propounded to me by the medical examiner are warranted to be true and full, and I acknowledge and agree that the said answers and statements with this application shall form the basis of my agreement with the Order, and constitute a warranty. I hereby make my medical examination a part of this application and agree that this application and medical examination shall be considered a part of my beneficiary certificate.

I further declare and agree that I know and understand the contents hereof and that the answers and statements as written herein are as given by me to the medical examiner.

I further agree, if accepted as a member of the Order, to faithfully abide by all its laws, rules and regulations now enacted or that may be hereafter enacted.

Dated at Chicago, Illinois, this 27th day of June, 1910.

Francis Shurmach, (his X mark.)

Witness: Elizabeth Roberts.

I hereby certify that the applicant signed the above in my presence.

Witness - E. F. Moran, Medical Examiner."

The by-laws in force from September, 1908, to September, 1912, were received in evidence. These by-laws, among other provisions, contained the following:

"Section 82. Prohibition as to Intemperance. If any member of this Society heretofore or hereafter shall become intemperate in the use of intoxicating liquors, or in the use of drugs or narcotics, or if his death shall result directly or indirectly from his intemperate use of intoxicating liquors, drugs or narcotics, then the beneficiary certificate held by said member shall become and be absolutely null and void, and all payments made thereon shall be thereby forfeited.

Section 85. When Not Entitled to Benefit. No member or beneficiary named in this certificate shall participate in or be entitled to be paid any sum from the beneficiary fund of this Order on account of injuries received, or death, caused by such member being engaged in a mob, riot, or insurrection, or as a result of being engaged in committing any offense against the laws of any State or of the Nation, or any other country, or who may die directly or indirectly from the intemperate use of intoxicating liquors.

Section 88. Effect of False Statements. In case any person shall make false representations in his application or medical examination for membership, either as to his physical or mental health or condition, age or family history, or as to any other fact, or shall conceal any of

his personal habits that are a violation of the laws of the Order, or shall conceal any other fact affecting the risk, neither such person nor his beneficiary or beneficiaries shall be entitled to receive any benefits by reason of a beneficiary certificate having been issued to him."

Dr. Napieralski, the family physician of the member, was called as a witness for defendant and testified substantially that he had treated Francis Sharmach previous to June 27, 1910, for nervous trouble. The plaintiff called him to treat Mr. Sharmach. It was delirium tremens at times. Delirium tremens is a nervous condition caused by excessive use of alcoholic liquors. The cause of Sharmach's death was chronic organic heart disease, and cirrhosis of the liver was a contributory cause. Cirrhosis of the liver is a hardening of the liver that is most frequently caused by alcoholism or excessive use of intoxicating liquors. He treated Sharmach for a period extending over three or four years previous to June 27, 1910. He further testified that he had given Sharmach the ordinary and usual treatment for delirium tremens. His treatments were always for the same thing.

Frank Sharmach testified that he heard his mother tell Mrs. Roberts that her husband could not go to the examiner as he had company the night before and was not feeling well, and Mrs. Roberts said she would come around Monday and then would go and see the doctor, and he should not drink in the meantime; that Francis got intoxicated sometimes once a month and sometimes twice, and that there were some months when he did not get drunk. In the year prior to Francis' death he thought Francis was drunk about once a month. Towards the last he did not get drunk so often.

The plaintiff testified that she told Mrs. Roberts when she came around to see about having her husband examined for the insurance that her husband was not feeling well, that he drank more than he should, and they made an

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China (Taiwan) regarding the situation in the Republic of China (Taiwan) since the end of the Second World War. This is a serious omission, as the Commission is required to provide a comprehensive report on the situation in the Republic of China (Taiwan) to the United Nations. The Commission is therefore unable to provide a complete and accurate report on the situation in the Republic of China (Taiwan) to the United Nations.

appointment for the following Monday. In the meantime the plaintiff was not to let him drink so much. She stated that sometimes her husband was drunk once a month and sometimes twice, and sometimes would not get drunk for three or four months, and that after he joined the lodge he did not drink so much; that her husband was forty-seven years old, and that when he stated to the doctor that he was forty-three years old she knew it was not true. She also testified that she told her husband to tell the examiner he was forty-three years old, and when Dr. Moran asked him his age, he stated he was forty-three; that she knew that his answer that he drank only a few glasses of beer was not true; that he had whiskey every morning, sometimes two glasses.

Dr. Moran, called as a witness on behalf of the defendant, testified in relation to her examination of Shermach in June, 1918; that the examination was in her handwriting; that he did not state he was ever drunk or intoxicated; that the application was filled out just as the answers were given. The witness denied the statements of Mrs. Roberts as to what was said and done during the examination of the applicant. On the trial the jury returned a verdict for the plaintiff for \$1,361.29.

In our opinion it was error to admit the testimony as to alleged conversations between appellee, the plaintiff, and Mrs. Roberts. Mrs. Roberts was not clothed with any authority to bind the appellant. She was not the agent of appellant. We think it was also error to admit the testimony of appellee as to what was said between the local medical examiner and the applicant. The applicant signed the examination and it became a warranty as to the truth of what was therein contained and was the basis, together with the application, upon which the insurance was afterwards issued.

There was no evidence in the case tending to show that the defendant society had misled the insured in any way in regard to any of the matters set up as a defense to the case, or created a belief on the part of the insured that a strict compliance with the letter of the contract as to these matters would not be expected, and that in consequence thereof the applicant made false statements or answers as to such matters. The oral charge to the jury, in so far as it submitted the question to the jury that the society had misled the insured, or waived a strict compliance with the contract and had induced the applicant to make false statements or answers was erroneous. There was no proper evidence upon which to submit that question.

The court further charged the jury that the statements and answers in the application are to be considered warranties and material to the risk and that if any of them was untrue, the plaintiff could not recover, unless the defenses were waived, or the plaintiff was not asked the questions to which the defenses related. This portion of the charge had no basis in the evidence and was erroneous.

The court further charged the jury that if the applicant stated he never had the disease known as delirium tremens there should be no recovery, unless they found that the applicant was not asked the question. There was no proper evidence upon which to base the suggestion to the jury that the plaintiff, meaning thereby the applicant, was not asked the question as to whether he had ever had the disease known as delirium tremens. This part of the charge is without basis in the evidence and was erroneous. There was no evidence of a waiver of any statement made in the application of the insured with reference to whether

he was addicted to intemperate or excessive use of liquor, and that part of the charge to the jury which instructed them in effect that if such a defense was waived, or that the applicant was not asked the question with reference to the use of any liquor, was not based upon any proper evidence in the case.

For the errors indicated, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

5982

253

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

191 I.A. 269

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day
of January, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
fowllowing, to-wit:

No. 5982.

Finley Barrell,

Appellee,

vs

Appeal from Lake.

Lake Forest Water Co.,

Appellant.

O p i n i o n b y C A R N E S P . J .

This is an appeal under Section 123 of our Practice Act, from an interlocutory order overruling a motion to dissolve an injunction which had been granted without notice on a bill filed by Finley Barrell the appellee against Lake Forest Water Co., a public service corporation, the appellant, to restrain it from shutting off the water from appellee's premises because of his failure and refusal to pay a bill rendered for water furnished in the month of July, August and September 1913, which bill appellee alleges was for an amount of water greatly in excess of what he used in that period.

The bill alleges an offer to pay a reasonable amount and prays an accounting, and there was filed therewith an affidavit setting out grounds for the issuing of an injunction without notice, in which affidavit it was also stated that the complainant had no other water supply.

Appellant answered the bill under oath, though the bill waived answer under oath, and filed with its answer affidavits in support thereof and moved to dissolve the injunction, which motion was on a hearing denied.

Appeal from Decree.

Appellee,

Lake Forest Water Co.,

Appellant.

Opinion by C A H W B P. J.

This is an appeal under Section 122 of our Practice Act, from an interlocutory order overruling a motion to dissolve an injunction which had been granted without notice on a bill filed by Winley Bartlett the appellee against Lake Forest Water Co., a public service corporation, the appellant, to restrain it from shutting off the water from appellee's premises because of his failure and refusal to pay a bill rendered for water furnished in the month of July, August and September 1915, which bill appellee alleges was for an amount of water greatly in excess of what he used in that period. The bill alleges an offer to pay a reasonable amount and prays an accounting, and there was filed therewith an affidavit setting out grounds for the issuing of an injunction without notice, in which affidavit it was also stated that the complainant had no other water supply. Appellant answered the bill under oath, though the bill waived answer under oath, and filed with its answer affidavits in support thereof and moved to dissolve the injunction, which motion was on a hearing denied.

Appellant asks a reversal of the order on the ground that an injunction should not have issued on the face of the bill, that appellee had an adequate remedy at law by paying the amount claimed and bringing an action to recover for over payment; that there is no sufficient allegation in the bill that damages arising from shutting off the water would be irreparable, that it is only so alleged in general terms and that the allegation in the affidavit ^{filed} with the bill that appellee has no other water supply cannot be considered because there is no foundation for it in the bill and because the certificate of evidence heard on the motion to dissolve does not show that the affidavit was then read or offered in evidence; and that if these contentions are not held good still the Court erred because on the proofs heard on the motion to dissolve the injunction the preponderance of the evidence was with appellant and the injunction should have been dissolved for that reason.

We are of the opinion that the bill on its face was sufficient to authorize the issuance of the writ. This Court in *Kerz v. Galena Water Co.*, 139 Ill. App. 598, recognized the right of a consumer of water furnished by a Public Utilities Company to apply to the court to restrain enforcement of a charge which he deemed unreasonable, and a reference to 40 Cyc, 805 - 806, and authorities cited in the notes, and to *City of Mansfield v. Humphreys Manufacturing Company*, 82 Ohio St. 216, reported in 31 L. R. A. (N. S.) 301, and the reporters

Appellant asks a reversal of the order on the ground
that an injunction should not have issued on the face of
the bill, that appellee had an adequate remedy at law by
paying the amount claimed and bringing an action to
recover for over payment; that there is no sufficient
allegation in the bill that damages arising from shutting
off the water would be irreparable, that it is only an
alleged in general terms and that the allegation in the
affidavit with the bill that appellee has no other water
supply should be rejected because there is no foundation
for it in the bill and because the certificate of evidence
based on the motion to dissolve does not show that the af-
fidavit was then read or offered in evidence; and that if
these contentions are not held good still the Court erred
because on the motion based on the motion to dissolve
the injunction the preponderance of the evidence was with
appellant and the injunction should have been dissolved
for that reason.

We are of the opinion that the bill on the face was
sufficient to authorize the issuance of the writ.
This Court in *East v. Graham*, 104 Ill. 111, 112, 113, 114, 115,
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a Public Utilities Company to apply to the court to
restrain enforcement of a charge which he deemed unrea-
sonable, and a reference to 43 Cyc. 802 - 803, and
authorities cited in the notes, and to *City of Kalamazoo*
v. Kalamazoo Manufacturing Company, 83 Ohio St. 218,
reported in 21 L. R. A. (N. S.) 301, and the references

Notes to that case, will show that the jurisdiction of a court of equity in cases like this is generally admitted, and that irreparable injury is presumed from allegations of fact such as are disclosed in this bill and will more fully appear in the further discussion of the case.

But we are of the opinion that the court erred in overruling the motion to dissolve the injunction, because it seems to us that under the evidence produced on that hearing it did not appear that there was an over charge for water supplied, and the right of appellant to shut off the water for non payment of the bill if there was no over charge is not questioned. Section 14 of our Injunction Act (J & A Stats. 6174.) provides for a hearing of a motion to dissolve an injunction in vacation on the coming in of the answer.

Section 15 provides that a motion to dissolve may be made at any time upon answer. Section 16, that the Court shall not be bound to take the answer as absolutely true, but shall decide the motion on the weight of the testimony. Section 17, that either party may read affidavits in evidence on the hearing; and Section 18, for continuance at the instance of the complainant to enable him to produce further testimony. It is evident the motion should be heard and determined upon the weight of the testimony introduced by the respective parties at the hearing. There is a certificate of evidence in this case from which it appears that appellee introduced no evidence on the hearing, the question therefore is whether the

...to that case, will show that the probability of a
...of equity in cases like this is generally admitted,
...that irreparable injury is presumed from allegations
of fact such as are disclosed in this bill and will not
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mony. Section 17, that either party may read either
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continuance at the instance of the complainant to enable
him to produce further testimony. It is evident that
motion should be heard and determined upon the weight of
the testimony introduced by the respective parties at the
hearing. There is a certificate of evidence in this case
from which it appears that appellee introduced no evidence
on the hearing, the question therefore is whether the

allegations of fact in his sworn bill were met by the answer under oath and the affidavits read in support thereof. It appeared by the bill that appellee had an extensive property served by water furnished by appellant to be measured by meters and paid for at a fixed price per one hundred gallons; that during the three months in question water so furnished was measured by five different meters respectively recording the amount of water furnished to his residence, his school house lot, his garage, his lawn and his greenhouse; that the bill rendered him was for 2, 629, 500 gallons which at $2\frac{1}{2}$ cents per one hundred gallons amounted to \$601.44, while the bill furnished him for the corresponding three months of 1912 was for 294,750 gallons, and the bill for the corresponding period of 1911 was 598,500 gallons. there is a positive allegation in the bill that the complainant did not use or consume the amount of water which said meters purported to show for the three months in 1913; that he only consumed one tenth of said amount, and did not consume or use on said premises as much water as he used and consumed there in the same period of the years 1911 and 1912 respectively; and it is further averred, on information and belief, that the meters are what is known as "Fast meters" and that the purported readings for the three months in 1913 are not correct and were not correct at the time they were made. It is also averred that the complainant has offered to pay the defendant a reasonable amount for water consumed by him during said period in

allegations of fact in his sworn bill were met by the
answer under oath and the affidavits read in support
thereof. It appeared by the bill that appellee had an
irrigative property served by water furnished by appellee
and to be measured by meters and paid for at a fixed price
for one hundred gallons. That appellee was not to pay
for water consumed in excess of the amount of five
different meters respectively according to the amount of
water furnished to his residence, his school house lot,
his garage, his lawn and his greenhouse; that the bill
rendered him was for 2, 321, 500 gallons which at 10 cents
per one hundred gallons amounted to \$321.50, while the bill
furnished him for the corresponding three months of 1912
was for 264,750 gallons, and the bill for the correspond-
ing period of 1911 was 328,800 gallons. There is a
positive allegation in the bill that the complainant did
not use or consume the amount of water which said meters
purported to show for the three months in 1912; that he
only consumed one tenth of said amount, and did not
consume or use on said premises as much water as he used
and consumed there in the same period of the years 1911
and 1912 respectively; and it is further averred, on inter-
motion and belief, that the meters are what is known as
"wet meters" and that the purported readings for the
three months in 1912 are not correct and were not correct
at the time they were made. It is also averred that the
complainant has offered to pay the defendant a reasonable
amount for water consumed by him during said period in

1913 and that defendant has refused to accept less than the full amount shown by its bills.

The answer, which for the purpose of the hearing we assume should have the force of an affidavit, does not specifically deny that the bill in question was for more water than was used by the complainant, but it in substance shows that the defendant's only knowledge of the amount of water furnished was obtained by a reading of its meters, and it is averred that the reading was correct and correctly reported as stated in the bill, and that the meters registered correctly, and that four of the five meters in question were owned by the complainant and not by the defendant; and that the sum that complainant offered to pay in settlement of the bill was \$349.75 (over half the amount of the bill) and that no other offer of payment had been made. The answer was supported by affidavits showing that the reading of the meters was correct and correctly reported at the amount shown in the bill, and that the meters were examined by an expert in March 1914, and found to be correct, and that in the opinion of the expert it is very improbable that they did not measure water passing through them in the months of July, August and September 1913 accurately. It appeared also in affidavits read by defendant that in other cases of large consumers the amount of water registered by their meters for the same period in different years greatly differed.

It is hardly conceivable that appellee could have

1915 and that defendant had refused to accept less than the full amount shown by his bills.

The answer, which for the purpose of the hearing was assumed should have the force of an affidavit, does not specifically deny that the bill in question was for more water than was used by the complainant, but it in substance shows that the defendant's only knowledge of the amount of water furnished was obtained by a reading of the meters, and it is averred that the reading as correct and correctly reported as stated in the bill, and that the meters registered correctly, and that four of the five meters in question were owned by the complainant and not by the defendant; and that the sum that defendant offered to pay in settlement of the bill was \$25.75 (over half the amount of the bill) and that no other offer of payment had been made. The answer also suggested by affidavit showing that the reading of the meters as correct and correctly reported as the amount shown in the bill, and that the meters were examined on an exact in March 1915, and found to be correct, and that in the opinion of the expert it is very improbable that they did not register water passing through them in the months of July, August and September 1915 necessarily. It suggested also an affidavit read by defendant that in other cases large amounts the amount of water furnished by their meters for the same period in different years greatly it is hardly conceivable that meters could have

known with any accuracy how much water was used from any other source of knowledge than the meters, and his positive statement that he only consumed one tenth of the amount shown, without any evidence to show on what that statement was based, is of little probative value; he did not act on that knowledge himself in fixing what he calls in his bill "a reasonable amount" to offer the defendant for water furnished. There may have been facts and circumstances as to the use of water on the different parts of the premises that if proven would have tended to show the amount of water used and the significance of the comparison between this and former years; but if the meters were in proper working order and good meters and correctly read and reported, as they apparently were so far as the evidence shows, we do not think an injunction should be permitted to remain in force supported only by the general statement of the consumer that he is charged for more water than he consumed, and more than he had been charged for in corresponding periods of former years. There may have been a waste of water on his premises through the neglect of his servants or through some defect in the pipe, and when a correct meter and a correct reading is shown it would seem that evidence negativing such a probable loss or waste should be offered before an injunction should be permitted to interfere with the usual and ordinary course of a Public Utilities body in enforcing payment of its bills. The order overruling the motion to dissolve the injunction is reversed and the cause remanded for another hearing on that motion, and for further proceedings in accordance with the views here expressed.

that motion, and for further proceedings in accordance with the views here expressed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

5987

254

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

191 I.A. 271

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day
of January, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
fowllowing, to-wit:

Gen. No. 5937.

Eugene Norton, Coroner, etc.

Defendant in error.

vs

Error to City Court of

Herman Deuchler, and T. J. Aurora Kane County.

Turney, Plaintiffs in error.

Carnes P. J.

Events upon which the decision of this case depends occurred in the following chronological order; (1) Two executions issued out of the City Court of Aurora on judgments against one Wackerlin and were placed in the hands of the sheriff of Kane County for service.

(2) While the executions were in the hands of the sheriff, Wackerlin gave a chattel mortgage to Herman Deuchler plaintiff in error on property of his in Kane County, but outside the city of Aurora. (3) The sheriff levied said executions on said chattels, so mortgaged, and took possession of them. (4) Plaintiff in error, Deuchler, brought an action of replevin for the property in the Circuit Court of Kane County and defendant in error, Eugene Norton coroner of Kane County, by virtue of the writ issued in that replevin suit took the property and turned it over to Deuchler, and he Deuchler, dismissed his replevin suit without a trial on the merits. (5) This action was brought on the replevin bond given by plaintiffs in error and is defended under Section 26 of our Replevin Act, (J. & A. State. pgf. 9211.) which provides that "When the merits of the case have not been determined on the trial of the action in which the bond was given, the defendant in the action upon the replevin bond may plead that fact and his title to the property in dispute, in said action of replevin."

Gen. Wm. West.

James West, Esq.,

Attorney at Law,

St. Louis, Mo.

vs

James West, Esq.,

Attorney at Law,

St. Louis, Mo.

Whereas James West, the defendant in this case,

is indebted to the plaintiff in the sum of \$100.00

and the plaintiff has been unable to collect the same

and the defendant has refused to pay the same

and the plaintiff has been forced to sue for the same

and the defendant has refused to pay the same

and the plaintiff has been forced to sue for the same

and the defendant has refused to pay the same

and the plaintiff has been forced to sue for the same

and the defendant has refused to pay the same

and the plaintiff has been forced to sue for the same

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and the plaintiff has been forced to sue for the same

and the defendant has refused to pay the same

and the plaintiff has been forced to sue for the same

and the defendant has refused to pay the same

and the plaintiff has been forced to sue for the same

of the plaintiff.

The pleadings are not shown in the abstract filed here but from the arguments of counsel we assume they were sufficient to permit the introduction of evidence in support of plaintiffs' suit on the bond and the defense of the obligors under this statute. The burden of proof was on the defendant to show property in himself in mitigation of damages." By permitting the suit to be dismissed he lost all right to contest the plaintiff's claim to the property except that saved to him by the Statute, which was to plead and prove his title to the property in mitigation of damages." *Stevison v Earnest*, 80 Ill. 513; *Magerstadt ex v Harder*, 199 Ill. 271; *Hanchett v Gardner*, 138 Ill. 571; *Hock v Magerstadt*, 124 Ill. App. 140.

Defendant in error had verdict and judgment for \$1200 debt, and \$272.50 damages. Plaintiffs in error raise no question as to the amount of the judgment, or any action of the court, except to claim that the executions issued out of the city court of Aurora were not, before levy, a lien on ~~xxx~~ property outside of the city of Aurora, and we are asked to construe the statute creating the city court, and determine whether an execution from that court placed in the hands of the sheriff of Kane County is, like an execution from the Circuit Court, a lien from the time it is received by the sheriff on personal property of the debtor wherever located in the County, and to rest our decision on our answer to that question.

Defendant in error, while claiming that an execution issued from the city court is a lien on personal property of the debtor to the same extent as is an execution issued from the Circuit Court of Kane County, says that the question is not raised on this record, because it does not appear from the evidence that plaintiff in error Deuchler, had any property in, or lien upon, the

The findings are not shown in the proposed findings but from the arguments of counsel we assume they were sufficient to permit the introduction of evidence in support of plaintiff's case on the bond and the release of the obligor under this statute. The defendant was on the defendant to show property in himself in mitigation of damages. By admitting the fact as an admission he lost all right to contest the plaintiff's claim to the property except that saved to him by the statute which was to place and prove his title to the property in mitigation of damages. Garmon v. Garmon, 100 Ill. App. 100. Defendant in error had verdict and judgment for \$1000 debt, and \$275.00 damages. Plaintiff in error raises no question as to the amount of the judgment, or any action of the court, except to state that the judgment is out of the city court of Aurora were not, before levy, a lien on xxx property outside of the city of Aurora, and we are asked to construe the statute creating the city court, and determine whether an execution from that court placed in the hands of the sheriff of Lake County is, like an execution from the Circuit Court, a lien from the time it is received by the sheriff on personal property of the debtor wherever located in the County, and so rest our decision on our answer to that question. Defendant in error, while claiming that an execution issued from the city court is a lien on personal property of the debtor to the same extent as is an execution issued from the Circuit Court of Lake County, says that the question is not raised on this record, because it does not appear from the evidence that plaintiff in

chattels in question.

The evidence offered by the defendant in error in the Court below is not abstracted but from the arguments of counsel we assume it is regarded sufficient to make a prima facie case for the plaintiff in this action on the replevin bond. Defendants' evidence showed that the property in question was all the time located in Kane County outside of the city of Aurora; and Deuchler testified that he never had any of the property, but that about a month or so before the replevin suit in the circuit court he had a transaction with Wackerlin in writing concerning the property, and that he was unable to find the writing though he had made a careful search for it. He then offered in evidence, according to the abstract, "Certified copy of chattel mortgage given by John Wackerlin to Herman Deuchler on the 29th. day of January 1911, recorded on the 29th. day of January, 1912" to which the plaintiff objected" because original not accounted for, and for ~~which~~ the further reason that the lien of the execution was attached prior to the execution of the mortgage" which objection the court sustained. The copy so offered in evidence describes a note secured therebb dated January 29, 1912 due on or before six months after date, payable to Herman Deuchler, signed by the mortgagor and for the principal sum of \$600. There was no offer to show an indebtedness from Wackerlin to Deuchler or to account for the loss of the note or to prove its contents other than above mentioned. While the proof of loss of the mortgage may have been sufficient under Section 5 of our Mortgage Act (J. & A. Stats. pgf. 7580) providing for proof by certificate of the Recorder, it was not sufficient ~~for ground~~ as a ground for secondary evidence of the contents of the note, and there was no

sufficient offer to prove the contents of the note.

"The introduction of the mortgage and note in evidence, or proof of their loss, and secondary evidence, was indispensable". *Flynn v Hathaway* 65 Ill. 462; this case is cited in 7 Cyc 32 in support of the text that "When an alleged mortgagee sues an officer for levying on mortgaged property, he must produce the note and mortgage in evidence or account for their absence and prove their contents"; and in *Fikes v Manchester* 43 Ill. 379, it is said "The production of the note and mortgage made a prima facie ~~case~~ right to the possession in the defendant." In *Rehkopf v Miller* 62 Ill. App. 662, the court is speaking of a sufficient prima facie case says there was introduced in evidence a valid chattel mortgage, also the notes secured thereby and evidence showing their bona fide character. We are of the opinion that the offer of proof by plaintiff in error, Deuchler, was not sufficient to show property in himself, and therefore whether the executions were a lien on the property prior to the levy, and whether that question can be properly raised in this case is immaterial.

Finding no reversible error in the record the judgment is affirmed.

and it is not sufficient to prove the contents of the note,
"The introduction of the mortgage and note in evidence,
on proof of their loss, and secondary evidence, was in-
admissible." *Thompson v. Thompson*, 101 Ill. 2d 111, 112, 113.
It is cited in the text of the report that "When an
alleged mortgage is introduced as evidence for levying on mort-
gaged property, the plaintiff must produce the note and mortgage in
evidence or account for their absence and prove their
contents"; and in *Wills v. Manchester*, 12 Ill. 373, it is
said "The production of the note and mortgage makes a
prima facie case right to the possession in the defend-
ant." In *Reinhardt v. Miller*, 67 Ill. App. 2d 208, the court
is speaking of a plaintiff's prima facie case and says there
is no distinction between a mortgage and a note.
also the notes secured thereby and evidence showing their
bona fide character. We are of the opinion that the
offer of proof by plaintiff in error, *Memorial*, was not
sufficient to show ownership in himself, and therefore
whether the exceptions were a lien on the property or not
to the levy, and whether the question can be properly
raised in this case is immaterial.
Finding no reversible error in the record the judgment
is affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and.. _____

Clerk of the Appellate Court.



5996

255

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:
Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

1911A. 272

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day
of January, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
fowllowing, to-wit:



Gen. No. 5996.

and E. B. Thomas, Jr. and wife
S. A. Wright et al appellees.

vs

Appeal from Lee.

Elsie Olson, appellant.

Carnes P. J.

Appellees Wright & Fleming, real estate agents, sued appellant Elsie Olson, before a justice of the peace for commissions on a sale of her farm of 160 acres, which they claim she, before the sale, agreed to pay them. They had verdict and judgment in the Justice Court for the full amount claimed, from which she prosecuted an appeal to the Circuit Court where there was also a verdict and judgment against her for the same amount. She brings the case here on appeal, her main contention being that the verdict is not supported by the evidence.

It is undisputed that Wright acting for his firm, the appellees, spent considerable time and effort in the and about the selling of the farm and that he procured one Ellsworth as a purchaser and negotiated a sale to him at \$200.00 per acre, which was evidenced by a written contract between appellant and Ellsworth, and that after ~~made~~ some deduction from the purchase price was made by appellant because she was not able to give possession of the farm at the time stipulated. Before the sale there was a conversation between Wright and appellant in relation to the sale of the farm, in which conversation Wright testifies she told him she would pay him a commission of \$1.00 an acre if he furnished a purchaser at \$200.00 an acre. Appellant testifies that she made him no such offer and never agreed to give him any commission for selling the farm and did not know that he was acting as her agent in the matter, but supposed he was acting for

Jan. 10, 1904.

J. A. Wright et al. vs. E. A. Olson.

Appeal from Dec.

vs.

E. A. Olson, Respondent.

Olson P. J.

Appeal from Dec. 10, 1903, and certain matters, and

Respondent E. A. Olson, before a Justice of the Peace for

commissions on a sale of her farm of 180 acres, which

they claim she, before the sale, agreed to pay them.

They had verdict and judgment in the Justice Court

for the full amount claimed, from which the respondent

on appeal to the District Court where there was also a

verdict and judgment against her for the same amount.

She brings the case here on appeal, her main contention

being that the verdict is not supported by the evidence.

It is undisputed that Wright acted for his firm,

the appellee, spent considerable time and effort in the

and about the selling of the farm and that he procured one

Ellsworth as a purchaser and negotiated a sale to him

at \$200.00 per acre, which was evidenced by a written con-

tract between appellant and Ellsworth, and that afterwards

some deduction from the purchase price was made by ap-
peal-

ant because she was not able to give possession of the

farm at the time stipulated. Before the sale there was a

conversation between Wright and appellant in relation

to the sale of the farm, in which conversation Wright

testified she told him she would pay him a commission

of \$1.00 an acre if he furnished a purchaser at \$200.00

an acre. Appellant testified that she made him no such

offer and never agreed to give him any commission for

selling the farm and did not know that he was acting as

Ellsworth the purchaser. The verdict depended on the opinion of the jury as to which of these two witnesses should be believed; no one else heard the conversation, and while there was some evidence tending to corroborate each of them, there was nothing of a definite character.

It was made quite certain that Wright was not in the employ or acting for the purchaser, and no reason appears why he should have interested himself in the matter without expecting compensation from the seller. There is no rule of law that compels a jury to find the evidence equally balanced where a fact is sworn to by one witness and contradicted by another, it may, and often does, happen that there is something in the appearance of the witnesses and their manner of testifying and the reasonableness or unreasonableness of their statements that leads a jury to place much more confidence in the statements of one than the other. It will serve no good purpose to set out here the various issues of corroboration of the testimony of these witnesses. We have carefully read the testimony and are of the opinion that we should not disturb the verdict of the jury, sanctioned by the trial judge, on the question of veracity as between these two parties. It follows that the judgment should be affirmed unless there was some material error of law.

It is objected that the court permitted objectionable matter, not pertinent to the issue, to get before the jury in testimony of witnesses, and it is insisted that it was reversible error to permit Wright to testify that he had appellant's land "listed on his books". We see no error in that, a real estate agent suing for commission on sale of land necessarily and properly testifies as to what he did in endeavoring to furnish a purchaser, he

Worth the purchase. The verdict depended on the opinion
of the jury as to which of these two witnesses should be
believed; no one else heard the conversation, and while
there was some evidence tending to corroborate each of
them, there was nothing of a definite character.
It was made quite certain that Wright was not in the en-
gine on acting for the purchaser, and no reason appears
why he should have introduced himself in the matter with-
out expecting comment on from the seller. There is no
rule of law that compels a jury to find the evidence
equally balanced where a fact is sworn to by one witness
and contradicted by another, it may, and often does,
happen that there is something in the appearance of the
witness and their manner of testifying and the reason-
ableness or unreasonableness of their statements
that leads a jury to place much more confidence in the
statements of one than the other. It will serve no good
purpose to set out here the various items of corroboration
of the testimony of these witnesses. We have carefully
read the testimony and are of the opinion that we should
not disturb the verdict of the jury, mentioned by the
trial judge, on the question of veracity as between these
two parties. It follows that the judgment should be
affirmed unless there was some material error of law.
It is stated that the court permitted objectionable
matter, not pertinent to the issue, to be before the
jury in testimony of witnesses, and it is insisted that
it was reversible error to permit Wright to testify that
he had appellant's land "listed on his books". We see no
error in that, a real estate agent suing for commission
on sale of land necessarily and properly testifies as to
what he did in endeavoring to furnish a purchaser, as

may and usually does, write letters, talk with parties and take people to see the land, it is usually competent for him to testify to such acts; if he had advertised the land for sale we presume he could have shown that; the listing of the land was a small item in that class, and even if it were considered error it is of little importance. We find nothing in other items of evidence and statements of witnesses that seem to us error. Wright testified to a conversation that he had with appellant after the transaction was closed and said "She didn't deny what she had told me", and again, "She didnt say any time that she wouldnt pay me." The first statement was stricken out by the court at the request of appellant, and the second one was brought out by appellant on cross examination, and no objection made to it. There is nothing in these statements or similar statements brought to our attention that we deem important.

The court instructed the jury that if they believed from the evidence "That the defendant listes her farm with the plaintiffs to procure a purchaser therefor at the sum of \$200.00 per acre and that she further agreed to pay plaintiffs as commission for procuring a purchaser the sum of \$1.00 per acre, and if you further believe from the evidence that the plaintiffs procured a buyer ~~of~~ for defendants farm who actually purchased same, at the agreed price, then the plaintiffs are entitled to recover in this suit, and the measure of recovery is the sum of ~~\$200~~ \$1.00 per acre." This instruction is complained of because the court used the word "listed" and is said to emphasize the other alleged error in permitting Wright to testify that he listed the farm. We see no force in this suggestion, the word "listed" was frequently used in the

and take people to see the land, it is usually competent for him to testify to such acts; if he had advised the land for sale we presume he could have shown that; the listing of the land was a small item in that case, and even if it were considered error it is of little importance. We find nothing in other items of evidence and statements of witnesses that seem to us error. Wright testified to a conversation that he had with appellant after the transaction was closed and said "She didn't deny what she had told me", and again, "She didn't say any time that she wouldn't pay me." The first statement was stricken out by the court at the request of appellant, and the second one was brought out by appellant on cross examination, and no objection made to it. There is nothing in these statements or similar statements brought to our attention that we deem important.

The court instructed the jury that if they believed from the evidence "That the defendant listened her talk with the plaintiff to procure a purchaser that for at the sum of \$800.00 per acre and that she further agreed to pay plaintiff as commission for procuring a purchaser the sum of \$1.00 per acre, and if you further believe from the evidence that the plaintiff procured a buyer and for defendants farm who actually purchased same, at the agreed price, then the plaintiffs are entitled to recover in this suit, and the measure of recovery is the sum of \$800.00 per acre." This instruction is complained of because the court read the word "listed" and is said to emphasize the other alleged error in permitting Wright to testify that he listed the farm. We see no force in this suggestion, the word "listed" was frequently used in the

4

testimony, as it is in ordinary conversation, in the sense of placed for sale, and was no doubt so understood by the jury.

There is nothing in this record that indicates to us imposition upon ~~xxxi~~ the appellant; her farm apparently sold for a good price and the commission was certainly not a high one, and we see no reason for reversing the judgment.

Finding no error in the record the judgment is affirmed.

testimony, as it is in ordinary conversation, in the
sense of placed for sale, and was no doubt so understood
by the jury.

There is nothing in this record that indicates to us
that the defendant was a seller; and the commission was certainly
not a high one, and we see no reason for reversing the
judgment.

Finding no error in the record the judgment is
affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6003

256

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

191 I.A. 274

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day
of January, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
fowllowing, to-wit:

No. 6003.

Louis F. Strawn,

Appellee,

vs

Nicholas Vipond,

Appellant,

Appeal from Livingston

O p i n i o n b y C A R N E S, P. J.

Appellant Nicholas Vipond, held the promissory note of appellee Louis F. Strawn, dated October 18, 1906, for \$100.00 and interest, with power of attorney to confess judgment attached; and February 2, 1912 obtained judgment thereon by confession for \$141.92.

Appellee filed this bill in equity to annul the judgment and restrain the collection of the note on the ground that its only consideration was losses at gambling at appellant's ^{sa}saloon and gambling house in Streator, about the year 1899; averring facts as a ground for equity jurisdiction that are not controverted. Appellant answered denying that the consideration of the note was losses at gambling, and averring that the original indebtedness was for \$70.00 money loaned in 1899, and that the note was given October 18, 1906 as evidence of that indebtedness and accrued interest thereon.

The cause was referred to the Master in Chancery to take evidence and report his conclusions thereon, which he did and reported that he found the allegations of the bill true and recommended a decree for the complainant.

W. 1908.

Charles F. Brown

Appellant

vs

Nicholas Vignon

Appellee

Appeal from Livingston

OPINION BY U. S. J. W. B.

Appellant Nicholas Vignon, held the promissory note of appellee Louis F. Brown, dated October 18, 1908, for \$100.00 and interest, with power of attorney to confess judgment attached; and February 8, 1912 obtained judgment thereon by confession for \$141.32.

Appellee filed this bill in equity to annul the judgment and restrain the collection of the note on the ground

that the only consideration was losses at gambling at

appellee's saloon and gambling house in Streater, about

the year 1899; averring facts as a ground for equity jurisdiction that are not controverted.

Appellant answered denying that the consideration of the note was losses at

gambling, and averring that the original indebtedness

was for \$70.00 money loaned in 1899, and that the note was

given October 18, 1908 as evidence of that indebtedness

and accrued interest thereon.

The cause was referred to the Master in Chancery to

take evidence and report his conclusions thereon, which

he did and reported that he found the allegations of the

bill true and recommended a decree for the complainant.

Objections and exceptions were filed and overruled by the Master and the Chancellor, and a decree for complainant was entered in accordance with the Master's findings and recommendations, from which decree the defendant prosecutes this appeal.

The controlling question is whether the note was given for a gambling debt. The only other question argued grows out of the Master's finding that appellee was intoxicated when he gave the note, which finding of fact is incorporated in the decree. Appellant insists there is no evidence to support that finding and no charge in the bill on which to base it. There is no such charge in the bill and appellee does not attempt to sustain the decree on that ground, therefore we may disregard that part of appellant's brief which is devoted to a discussion of the law applicable in cases where it is sought to cancel a note or other written obligation on the ground that the maker was intoxicated when he executed the instrument, and confine our attention to the remaining question. It is not denied that the decree should be affirmed if as a matter of fact the consideration of the note was a gambling debt.

The only evidence in the case is that of the parties themselves as witnesses and some letters written by appellee in 1907 to appellant's lawyer in which he speaks of his effort to pay the note and expectation to do so.

Appellee testified that he was a practicing lawyer and at that time Assistant United States District Attorney with an office in the Federal Building in Chicago; that he has never seen the note since its alleged execution - and cannot state that he ever saw it; that in the winter and

Options and exceptions were filed and overruled by the
Master and the Commissioner, and a decree for judgment
was entered in accordance with the Master's findings and
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out of the Master's finding that appellee was intoxicated
when she gave the note, which finding of fact is incor-
porated in the decree. Appellant insists there is no
evidence to support that finding and no change in the bill
on which to base it. There is no such change in the bill
and appellee does not attempt to sustain the decree on that
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themselves as witnesses and some letters written by appellee
in 1907 to appellant's lawyer in which he speaks of his
effort to pay the note and expectation to do so.

Appellant insists that he was a gambling lawyer
and at that time Assistant United States District Attorney
with an office in the Federal Building in Chicago; that he
has never seen the note since its alleged execution - and
cannot state that he ever saw it; that in the winter and

spring of 1899 he visited Streater on several occasions on business, and on one of these occasions visited appellants saloon, but does not recall the time of day or night; that after appellant had closed his saloon for that night a poker table was secured from an upstairs room and placed near the end of the bar nearest the street opening and near a large heating stove or other heating apparatus, for the reason that it was cold, being winter time; that there were five or six players. Appellant or one of his associates, acted as banker, that is, sold chips of different colors - ranging in value from 5 cents to \$5.00. That when he, appellee, went to Streater that day he had from \$100.00 to \$200.00 in currency, and had either a Pontiac or Government draft; that he played until along towards morning when he had lost all of his currency, then offered the draft for more; that appellant looked at the draft and said no, he would advance him the chips, and did from time to time advance him chips at \$10.00 a purchase until morning, when the game broke up, and he asked appellant how much he owed him and was told \$70.00; that he handed appellant the draft of over \$300.00, and told him to take it out of that, but appellant handed it back saying he hadn't got that much money and telling him to come in after breakfast. That appellee got the draft cashed at a bank across the street from the saloon, and don't remember going back to the saloon and don't remember much of anything until he woke up in Chicago a few days afterwards. That some years afterward appellant brought suit against him in the County Court which suit was dismissed for want

Spring of 1899 he visited Streator on several occasions on business, and on one of these occasions visited appellant's saloon, but does not recall the time of day or night; that after appellant had closed his saloon for that night a poker table was secured from an upstairs room and placed near the end of the bar nearest the street opening and near a large heating stove or other heating apparatus, for the reason that it was cold, being winter time; that there were five or six players. Appellant on one of his associates, acted as banker, that is, sold chips of different colors - ranging in value from 5 cents to \$5.00. That when he, appellee, went to Streator that day he had from \$100.00 to \$300.00 in currency, and had either a Pontiac or Government draft; that he played until about towards morning when he had lost all of his currency, then offered the draft for more; that appellant looked at the draft and said no, he would advance him the chips, and did from time to time advance him chips at \$10.00 a purchase until morning, when the game broke up, and he asked appellant how much he owed him and was told \$70.00; that he handed appellant the draft of over \$300.00, and told him to take it out of that, but appellant handed it back saying he hadn't got that much money and telling him to come in after breakfast. That appellee got the draft cashed at a bank across the street from the saloon, and don't remember going back to the saloon and don't remember much of anything until he woke up in Chicago a few days afterwards. That some years afterwards appellant brought suit against him in the County Court which suit was dismissed for want

of prosecution; that some time on 1906 he went from Ottawa to Streator, had been drinking pretty heavily and went into appellant's saloon during the evening, and has a vague recollection of signing something, but no recollection of what it was. That he never owed appellant a dollar in his life outside of this transaction.

Appellant testified that Strawn came to his place of business about eleven o'clock one night and said he was on his way to Chicago, and was a little stranded and wanted to borrow some money; that he wanted \$70.00 and he let him have it; that appellee handed him a check for some ninety odd dollars and asked him to cash it; it was the check of some business man in Pontiac, and he told Strawn, that he, Strawn, would be in Pontiac before he would and to take the check back with him and cash it and send him the \$70.00 and Strawn said he would do so. That appellee never played poker, or bought a poker chip in his place, and that the consideration for the note was \$70.00 cash borrowed, and not for losses in gambling; and that he, appellant, was not running a gambling house and never did run a gambling house in Streator. He admitted on cross examination that at the time in question there was a gambling house run on the second floor of the building in which his saloon was located, that it had an outside entrance and also a stairway from his saloon, but said he had no connection with it and denied that a table was brought down from there as testified by appellee. There is no substantial disagreement about the time of the original seventy dollar indebtedness or that the note in question was given for that indebtedness and interest. The only question is whether

indifference and interest. The only question is whether indifference or that the note in question was given for that disagreement about the time of the original seventy dollar there as testified by appellee. There is no substantial question with it and denied that a table was brought down from also a stairway from his saloon, but said he had no concern. His saloon was located, that it had an outside entrance and ling house run on the second floor of the building in which examination that at the time in question there was a gambling house in Stretton. He admitted on cross-appellant, was not running a gambling house and never did borrowed, and not for losses in gambling; and that he, that the consideration for the note was \$70.00 cash played poker, or bought a poker chip in his place, and and Starn said he would do so. That appellee never the check back with him and cash it and send him the \$70.00 he, Starn, would be in Pontiac before he would and to take of some business man in Pontiac, and he told Starn, that odd dollars and asked him to cash it; it was the check have it; that appellee handed him a check for some ninety to borrow some money; that he wanted \$70.00 and he let him on his way to Chicago, and was a little nervous and worried business about eleven o'clock one night and said he was appellant testified that Starn came to his place of dollar in his life outside of this transaction. That he never owed appellant a ion of what it was. Appellee's recollection of signing something, but no recollection went into appellant's saloon during the evening, and has a Ottawa to Stretton, had been drinking pretty heavily and of association; that some time he went from

the seventy dollar debt was for a loan to provide funds for appellee's expenses or whether it was for losses at a poker game.

It is no doubt true, as claimed by appellant, that the burden of proof was on appellee to establish his case by a preponderance of the evidence, and if he has failed to do so that the decree should be reversed. But it by no means follows that if it seems to us on a reading of the record that the evidence is evenly balanced, or even preponderates slightly in favor of appellant, that we should reverse the decree. If the master had been of the opinion that the evidence was evenly balanced he should not have recommended a decree for the complainant, and we must assume he would not have done so. We must put into the scale, on appellee's side, in balancing the testimony of these two witnesses, the fact that the master heard them testify and found that the testimony of appellee was of greater weight than that of appellant. Just what weight should be given to the finding of facts of a Master who has seen the witnesses and heard their testimony is difficult to state; different courts have reached different conclusions and expressed them in language hard to reconcile; but the authorities are quite uniform that a Master's report is presumptively correct and that his conclusions will not be disturbed unless error is made affirmatively to appear. In some jurisdictions his finding on conflicting evidence is given the same weight as the verdict of a jury, and in some it is not, 16 Cyc 453.

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conclusions will not be disturbed unless error is made
relatively to appear. In some jurisdictions his
finding on conflicting evidence is given the same weight as
the verdict of a jury, and in some it is not, 18 Cyc 457.

In Illinois it is held that the Master's findings are only advisory to the Chancellor though they are entitled to great weight where he has heard the witnesses testify, *Brueggestradt v. Ludwig*, 184 Ill. 24; *Kelly v. Fahrney*, 242 Ill. 200; *Kingman v. Kingman*, 150 Ill. App. 456. But there is no rule of law that denies the effect that should be given to the conclusions of a man who has seen witnesses and heard them testify, against those of another man who has only read what they said; the principle is grounded in the common belief of mankind that we can judge much better of the truth or falsity of a statement if we can see the person that made it, and observe his manner of telling it.

We do not feel warranted in saying that the Master erred in his conclusion as to the ^ewight of the testimony and as there is no other question involved the judgment is affirmed.

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much better of the truth or falsity of a statement if we
can see the person that made it, and observe his manner
of telling it.
We do not feel warranted in saying that the
Master erred in his conclusion as to the right of the
testimony and as there is no other question involved the
judgment is affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

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(257)

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

191 T.A. 275

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

April 15, 1914 affirmed
May 21, 1914 R-N granted

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day
of January, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
fowllowing, to-wit:

No 5888.

Dime Savings & Trust Company,	}	
Administrator, etc.,		
appellee,		
vs.		Appeal from Peoria.
Abraham Jacobson,	}	
Appellant.		

O p i n i o n b y D I B E L L , J .

This is a suit by appellee, as Administrator de bonis non of the estate of Harry Olin, deceased, against Abraham Jacobson upon a note for \$500, dated January 6, 1910, and payable February 11, 1911, with interest at seven per cent per annum, payable to Olin and signed by defendant, in the margin of which note the amount is stated as "\$510.", and upon a check drawn by defendant in favor of H. Olin on the Interstate Bank and Trust Company of Peoria for \$525, dated September 10, 1911, and bearing the number 7592. There was an appropriate declaration upon these instruments, with an affidavit of claim, and a plea of non assumpsit with an affidavit of merits, and a jury trial and a verdict for plaintiff for \$1,176; and a motion by defendant for a new trial was denied and plaintiff had judgment and defendant appeals.

Plaintiff introduced said instruments in evidence and proved that the plaintiff received said instruments from the former administrator, and proved that after the death of Olin said check was presented to the bank

No. 2885.

State Savings & Trust Company,

Administrator, etc.,

Appellee,

vs.

Isaac Jacobson,

Appellant.

Appeal from Peoria.

Opinion by D I B E L L, J.

This is a suit by appellee, as Administrator of the estate of Henry Olin, deceased, against Isaac Jacobson upon a note for \$500, dated January 4, 1910, and payable February 11, 1911, with interest at seven per cent per annum, payable to Olin and signed by defendant, in the margin of which note the amount is stated as \$770.00, and upon a check drawn by defendant in favor of H. Olin on the Interstate Bank and Trust Company of Peoria for \$525, dated September 10, 1911, and bearing the number 7392. There was an appropriate declaration upon these instruments, with an affidavit of claim, and a plea of non assumpsit with an affidavit of merits, and a jury trial and a verdict for plaintiff for \$1,176; and a motion by defendant for a new trial was denied and plaintiff had judgment and defendant appeals.

Plaintiff introduced said instruments in evidence and proved that the plaintiff received said instruments from the former administrator, and proved that after the death of Olin said check was presented to the bank

for payment and that payment was refused for want of sufficient funds, which made a case for plaintiff. The defense was payment of the instruments sued on, in the lifetime of Olin. Defendant was not a competent witness on that subject. Mrs Lipkin testified that she was a sister of defendant and his stenographer for nine years and was acting as such in April, 1911, and that during that month Olin came to Jacobson's office in the absence of the latter, and said he came to get the balance on that note, and waited till Jacobson came, and Olin and Jacobson had a conversation, and then Jacobson gave Olin a check for \$320. and that she was that all that is now on the face of that check was there when it was written, and that Jacobson gave the check to Olin and asked Olin for the note, and that Olin said he had misplaced it but that when he found the note, he would return it to Jacobson. Charles Frankel testified that in October or November, 1911, he was in Jacobson's office and heard a conversation between Olin and Jacobson about another matter, and then, as Olin was starting to leave, Jacobson said to Olin: "How about the check for \$500 and the note for \$525 which I have paid you; and you said you were going to return it, and I have not seen it yet?" to which Olin replied: "I put it away some place and I don't know where it is," and then said to Frankel: "You can be a witness that it is paid, and I don't know where I put it; as soon as I find it I will give to you," and that Olin also said that

for payment and that payment was refused for want of sufficient funds, which made a case for plaintiff. The defense was payment of the instruments sued on, in the lifetime of Olin. Defendant was not a competent witness on that subject. Mrs. Lipkin testified that she was a sister of defendant and his stenographer for nine years and was acting as such in April, 1911, and that during that month Olin came to Jacobson's office in the absence of the latter, and said he came to get the balance on that note, and asked for the note, and Olin and Jacobson had a conversation, and then Jacobson gave Olin a check for \$320, and that she was that all that is now on the face of that check was there when it was written, and that Jacobson gave the check to Olin and asked Olin for the note, and that Olin said he had misplaced it but that when he found the note, he would return it to Jacobson. Olin's friend testified that in October or November, 1911, he was in Jacobson's office and heard a conversation between Olin and Jacobson about another matter, and then, as Olin was starting to leave, Jacobson said to Olin: "How about the check for \$300 and the note for \$320 which I have paid you; and you said you were going to return it, and I have not seen it yet?" to which Olin replied: "I put it away some place and I don't know where it is," and then said to Frankel: "You can be a witness that it is paid, and I don't know where I put it; as soon as I find it I will give to you," and then Olin also said that

he received the money from Abe for it, but cannot locate it, but that as soon as he found it he would turn it over to Jacobson. Defendant also introduced in evidence three checks drawn by Jacobson in favor of Olin or order on said Interstate Bank & Trust Company. The first was dated April 15, 1911, for \$320, which also bore upon its face the following language: "Balance in full payment of note dated January 6th, 1910." The second was dated September 12, 1911, was for \$25 and bore on its face the following language: "¢ check #7592 for \$525.00" The third was dated September 14, 1911, for \$500 and bore on its face the following language: "In full of check #7592 \$525.00 9/10/1911." Each of these checks was endorsed "H. Olin" and each bore upon its face cancellation marks showing it paid by the bank. There was no evidence that the special language on the face of these checks was not written before they were signed and delivered, and there was positive evidence by Mrs. Lipkin that the language in the first of said checks was upon said check when it was signed and delivered. It will be noticed that said two checks last above described each professed to be in payment of check No. 7592 and the last of them also given the date of said check 7592, and that the check sued on bears that number and is of that date. This evidence therefore tended strongly to show that the instruments sued on were paid to H. Olin in his lifetime, and were not surrendered to Jacobson because Olin said he could not find them. The plaintiff took its title thereto

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merely as Administrator, and, if the instruments were paid to Olin, the administrator cannot recover thereon.

There was no evidence to overcome this proof by defendant, except such argument as is based upon the cross examination of defendant's witnesses. There appears to us to be a clear preponderance of evidence that the instruments sued upon were paid to Olin in his lifetime, and we conclude that the court below erred in not granting a new trial.

It is argued that the court erred in giving at the request of appellee the second instruction, which was as follows:

"2. The court instructs you that the cancelled checks introduced in evidence by the defendant are not conclusive evidence that either the check or note sued on has been paid. You have a right to determine the meaning and effect of the writing appearing on such checks in the light of all the other evidence in the case and to give the same such weight or credence as you believe they are entitled to."

If it be conceded that there is evidence from which it might fairly be contended that the language which we have above quoted from the cancelled checks, introduced in evidence by appellant, was not upon said checks when they were delivered to H. Olin, the payee, then it would be proper to instruct the jury that they were authorized to determine from the evidence whether that language was upon those checks when they were so delivered. If that

Chiefly as Administrator, and if the instruments were said to be Olin, the Administrator cannot remove them.

There was no evidence to overcome this proof by defendant, except such argument as is based upon the close examination of defendant's statement. There

appears to us to be a clear preponderance of evidence that the instruments were paid to Olin in his lifetime, and we conclude that the court below erred in not granting a new trial.

It is argued that the court erred in giving at the request of appellee the second instruction, which was as follows:

"The court instructs you that the cancelled

checks introduced in evidence by the defendant are not conclusive evidence that either the check or note sued on has been paid. You have a right to determine the meaning and effect of the writing appearing on each check in the light of all the other evidence in the case and to give the same such weight or credence as you believe they are entitled to."

1241 66.

If it be conceded that there is evidence from which it might fairly be contended that the language which we have above quoted from the cancelled checks, introduced in evidence by appellant, was not upon said checks when they were delivered to H. Olin, the payee, then it would be proper to instruct the jury that they were authorized to determine from the evidence whether that language was upon those checks when they were so delivered. If that

language was upon those checks when delivered, but there was evidence from which different meanings could be attributed to that language, then it would be proper to authorize the jury to determine what meaning was intended by the drawee and payee of that check when it was delivered. But we do not find in this record any evidence that more than one meaning could be attributed to that language, and therefore we find in the record no evidence which would justify submitting to the jury its meaning. The language above quoted is plain and, so far as we can see, can have but one meaning, and we are of opinion that it was incorrect and misleading to submit its meaning to the jury, and to thereby intimate to the jury that the court was of opinion that the jury might rightfully give that language some other meaning than that which any business man would understand it to have.

The judgment is reversed and the cause is remanded.

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was evidence from which different meanings could be attri-
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the drawer and payee of that check when it was delivered.
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than one meaning could be attributed to that language, and
therefore we find in the record no evidence which would
justify submitting to the jury its meaning. The
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was incorrect and misleading to submit its meaning to the
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was of opinion that the jury might rightfully give that
language some other meaning than that which any business
man would understand it to have.
The judgment is reversed and the cause is remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

The first part of the paper is devoted to a discussion of the
 various methods which have been proposed for the determination of
 the rate of reaction between a radical and a molecule. The
 most common of these is the method of initial rates, in which
 the initial rate of reaction is measured for a series of
 different concentrations of the reactants. This method is
 simple and convenient, but it is not very accurate, and it
 is often difficult to obtain reliable results. Other methods
 which have been proposed include the method of integrated
 rates, in which the integrated rate law is used to determine
 the rate constant, and the method of half-lives, in which
 the half-life of the reaction is measured. Each of these
 methods has its own advantages and disadvantages, and the
 choice of method depends on the nature of the reaction and
 the accuracy required.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October,
in the year of our Lord one thousand nine hundred and fourteen,
within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

1911 A. 321

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 6th day
of January, A. D. 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
fowllowing, to-wit:

Gen. No. 6020

Drainage Commissioners etc. appellee

vs

Appeal from Lee.

James R. McCormick, appellant.

Dibell, J.

Appellee, Drainage Commissioners of Union Drainage District No. 1 in the towns of Harmon and Marion in Lee County, Illinois, sued James R. McCormick in assumpsit in the circuit court. A jury was waived, the case was tried on a stipulation as to the facts and the issues were found for the appellee, and its damages assessed at \$218. and it had judgment therefor, from which defendant below appeals.

Appellant had acted as treasurer of said district for two years, and when this suit was brought he had in his hands \$218 collected by him as treasurer from the Drainage Tax of said District, and he retained it under the claim that he was entitled to that sum as his commissions for monies paid out by him during the year 1913. Appellee is organized under the Farm Drainage Act, Section 15b thereof provides that the Drainage Commissioners shall appoint a treasurer, who shall receive all funds of the Drainage District and pay the same out only on written orders, signed as there provided, and that the commissioners shall fix the compensation of their treasurer, which shall not exceed two per cent of the amount paid out. When this district was first organized, the compensation of the first treasurer was fixed at two per cent. It is not claimed that there was any general order, fixing the compensation of all treasurers at two per cent, but only that the compensation of the first treasurer was fixed at that rate. There is no record of the District fixing

San, W. 1902

Drainage Commissioners etc. appeals

Appeal from Dec. 1902

James A. McConnel, appellant.

Decree, 1.

Appellee, Drainage Commissioners of Union Township

District No. 1 in the town of Harmon and Marion in the

County, Illinois, and James A. McConnel, appellee.

In the circuit court, a jury was waived, and the case was

tried on a stipulation as to the facts and the issues

were found for the appellee, and the damages assessed at

\$218, and it had judgment therefor, from which appellant

below appeals.

Appellant had acted as treasurer of said district

for two years, and when this suit was brought he had in

his hands \$218 collected by him as treasurer from the

Drainage Tax of said District, and he retained it under

the claim that he was entitled to that sum as his commis-

sion for months paid out by him during the year 1912.

Appellee is organized under the First Drainage Act, Section

15b thereof provides that the Drainage Commissioners shall

appoint a treasurer, who shall receive all funds of the

Drainage District and pay the same out only on written

orders, signed as herein provided, and that the commissioners

shall fix the compensation of their treasurer, which shall

not exceed two per cent of the amount paid out. When

this district was first organized, the compensation of

the first treasurer was fixed at two per cent. It is

not claimed that there was any general order, fixing the

compensation of all treasurers at two per cent, but only

that the compensation of the first treasurer was fixed

at that rate. There is no record of the District fixing

the compensation of appellant at any sum or rate whatever. All former treasurers have been paid two per cent and appellant was paid two per cent for his services the first year. He retained the sum here in question for the second year of his employment as treasurer, and the Board, instead of allowing him commissions, sued him to recover that sum. We regard it as the settled law of this state that one who accepts a public office for whose compensation no law or order has been passed, can have no compensation whatever. He cannot appropriate to his own use for his compensation any of the monies of his office, unless his compensation has been fixed. *Purcell v Parks*, 82 Ill. 346. This case and doctrine was cited with approval in *People v Fuller* 238 Ill. 116, 127, and in *People v Maddox*, 162 Ill. App. 95. An officer of the law cannot recover for his services under a *quantum meruit*, but is limited to the fee or compensation provided by law. *Smith v McLaughlin* 77 Ill. 596; *Schnadt v Davis* 185 Ill. 476, 484; *C. & M. E. R. R. Co. v Judge*, 135 Ill. App. 377. As the compensation of this officer had not been fixed by the commissioners for the year 1913, he cannot retain any sum as his compensation, and indeed, under Section 15b above referred to, he would have to have a written order issued as therein provided to authorize him to retain it, even if it had been fixed. Whether he can compel the commissioners to adopt an order fixing his compensation for that year is a question not before us. It is contended that the commissioners are suing in their individual capacity and not as a corporate body, but the suit seems to have been brought in the corporate name established by Section 1 of said Act.

Counsel also seek to litigate the question whether under certain other agreed facts, which we have not

the Commission at the time it was made. All former treasurers have been paid two per cent. All former treasurers have been paid two per cent. The Commission was paid two per cent for his services the first year. He retained the same here in question for the second year of his employment as treasurer, and the Commission, instead of allowing him compensation, asked him to recover that sum. We regard it as the settled law of this State that one who accepts a public office for whose compensation no law or order has been passed, can have no compensation whatever. He cannot appropriate to his own use for his compensation any of the moneys of his office, unless his compensation has been fixed. Russell v. Burke, 88 Ill. 318. This case and Justice was cited with approval in People v. Tulloh 238 Ill. 116, 127, and in People v. Madison, 182 Ill. App. 32. An officer of the law cannot recover for his services under a quantum meruit, but is limited to the fee or compensation provided by law. Estate v. Northwestern 77 Ill. 508; Gonnard v. Davis 133 Ill. 100. At the commission of this officer had not been fixed by the commissioners for the year 1913, he cannot retain any sum as his compensation, and indeed, under Section 150 above referred to, he would have to have a writ of order to such as therein provided to authorize him to retain it, even if it had been fixed. Whether he can compel the commissioners to adopt or reject fixing his compensation for that year is a question not raised. It is contended that the commissioners are acting in their individual capacity and not as a corporate body, but the writ seems to have been brought in the corporate name established by Section 1 of said Act. Gonnard also seeks to litigate the question of fees under certain other agreed facts, which we have not

stated, appellant was during said year treasurer of said District de jure or de facto or was merely an interloper unlawfully in office. Under our conclusions above stated, the judgment is right, whichever conclusion we might reach as to the nature of his holding of said office, and we therefore deem it unnecessary to decide that question.

The judgment is affirmed.

stated, appellant was found and taken prisoner of said
District of Columbia or de facto or was merely an interloper
unlawfully in office. Under our conclusions above stated,
the judgment is right, whichever conclusion we might reach
as to the nature of his holding of said office, and we
therefore deem it unnecessary to decide that
The judgment is affirmed.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

TO THE
HONORABLE
MEMBERS OF THE
LEGISLATIVE COUNCIL
OF THE PROVINCE OF
SOUTH AFRICA
IN PARLIAMENT ASSEMBLED
I HAVE THE HONOR TO
ACKNOWLEDGE THE RECEIPT
OF YOUR LETTER OF THE
10th INSTANT, IN
WHICH YOU REQUESTED
THAT I SHOULD
BE PLEASANT TO
FURNISH YOU WITH
A COPY OF THE
REPORT OF THE
COMMISSIONER OF
THE LAND OFFICE
IN RESPONSE TO
YOUR RESOLUTION
OF THE 10th INSTANT
AND I HAVE THE HONOR
TO INFORM YOU THAT
I HAVE THE PLEASURE
TO FURNISH YOU
WITH A COPY OF
THE REPORT OF THE
COMMISSIONER OF
THE LAND OFFICE
IN RESPONSE TO
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THE REPORT OF THE
COMMISSIONER OF
THE LAND OFFICE
IN RESPONSE TO
YOUR RESOLUTION
OF THE 10th INSTANT

18723
10 - 18723.

JOHN F. DEVINE, Administrator of the
Estate of RUSSELL B. SCOTT, Deceased,
Plaintiff in Error,

vs.

SUPERIOR COURT,

ILLINOIS CENTRAL RAILROAD COMPANY, a
corporation, and BLUE ISLAND CAR &
EQUIPMENT COMPANY, a corporation,
Defendants in Error.

COOK COUNTY.

191 I.A. 330

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

Upon the trial of a suit instituted in the Superior Court by John F. Devine, administrator of the estate of Russell B. Scott, deceased, against the Illinois Central Railroad Company, hereinafter called the railroad company, and the Blue Island Car & Equipment Company, hereinafter called the equipment company, to recover damages for wrongfully causing the death of plaintiff's intestate, the court, at the close of the evidence for the plaintiff, upon the motion of each of the defendants, instructed the jury to find the defendants not guilty, and upon the verdicts so returned, separate judgments were entered against plaintiff in bar of his action and for costs. This writ of error is prosecuted to reverse such judgments.

On October 22, 1904, the equipment company operated a plant, embracing about 25 acres and enclosed by a board fence, for the manufacture and repair of freight cars. At the southwest corner of the enclosure was a double gate which was ordinarily kept closed and locked. The railroad company maintained a single track which ran into the plant through said gate, where it connected with a system of tracks belonging to the equipment company running through the plant. The space between the westerly track and the next track to the

east, was used by the equipment company for storage and for the placing or piling thereon of so-called "Kindall frames", which were T-shaped, constructed of wrought iron, 6 or 7 feet in height, having a bottom width of about 3 feet, and weighing about two tons each. As so placed or piled in said space, there was usually a distance of about eight inches between the frames and the body of cars of ordinary width, passing on the westerly track. The frames were removed from time to time as required for use, but the frames in question had remained, where they stood at the time of the accident, for about five days. The deceased was employed by the equipment company as a night watchman, and among his duties was to open and close the gates, and to deliver orders from his superintendent to incoming train crews with reference to the disposition of cars hauled within the plant. At about 10 o'clock on the night in question a crew of the railroad company approached the gates with a train consisting of a locomotive, three cars and a caboose, and gave the usual signal for the gates to be opened. The deceased opened the gates in response to the signal, and delivered an order for the placing of the cars to the conductor. The cars were of the gondola type and the one in question was loaded to its capacity with lumber. The end-gates of said car were turned down upon the platform and the lumber was piled upon the platform and held in place by the upright sides. As the train entered the plant of the equipment company the cars were ahead. The train thus backed in slowly, and the deceased and McCarthy, a switchman employed by the railroad company, walked upon the track ahead of the cars. When the head car, being the one in question, reached the point where the frames were standing, it came in contact with one or more of said frames, causing the same to fall. As the frames were falling, the deceased

ran to the right to avoid some anticipated danger and was struck by one of the falling frames and injured, from which injuries he died. An examination of the car made early the following morning disclosed that both sides of the car were bulged out, the east side, being the side which had come in contact with the frames, more than the other; that the east side was bulged out 6 or 7 inches at the top; that the upright stakes which supported that side of the car fit into iron pockets which were bolted to the under sill; that the bolts had been drawn into the wood of the sill, thus permitting the pockets to enlarge and the stakes to sway out; that there was a fresh mark or cut on the front stake about 13 inches from the top and a like mark or cut on the sill; that one of the grab-irons appeared to have been recently torn off. The car was loaded solidly with oak planks placed "back and forth" tier upon tier. Prior to the accident and while the frames were in the same position, the railroad company had made frequent deliveries of cars within the plant of the equipment company, upon which occasions the cars operated upon the track in question had safely cleared said frames.

The declaration contains three counts. The first count charges that the equipment company negligently piled said frames so close to said railroad track that they would not clear said cars; that the railroad company negligently managed and operated said cars so as to cause said cars and a certain projection thereon to not clear said frames, and to strike said frames by reason of its negligence in having said car project outward. The second count charges that the equipment company negligently piled the said frames so that they were liable to fall, and so that the same were close to and adjoining said railroad track, and so that cars moved upon said track would strike said frames; that the railroad company negligently managed and operated said cars so as to cause

the same to strike said frames without inspecting said track and said frames to ascertain whether said cars would clear said frames. The third count charges both defendants with negligence in failing to inspect said cars and frames.

The first ground upon which plaintiff in error seeks to hold the equipment company liable is the alleged negligence of said company in placing said frames so close to the track that they were liable to be struck by a passing car.

It is clearly established by the evidence that the frames as placed by the equipment company afforded sufficient room for all properly loaded, good order cars, to safely clear said frames, while said cars were passing upon the west track.

There is no evidence tending to show that the equipment company was chargeable with notice or knowledge that the car which struck the frames was so improperly loaded or so improperly permitted to project outward that it was liable to strike said frames.

It is secondly urged by plaintiff in error that the equipment company negligently piled the frames.

The evidence is undisputed that the frames were piled or placed in such manner that they were not liable to fall unless violently struck by a defective car passing upon the track, or by other violent means.

We fail to perceive any evidence in the record to support a recovery against the equipment company upon the grounds urged, and a peremptory instruction to find said company not guilty, was, therefore, properly given.

It is insisted on behalf of the railroad company that the only negligence charged against it in the first count of the declaration is that it so carelessly operated and managed the cars that the same, and a projection thereon, struck and knocked down the frames, and that there is an entire absence of any proof to support such charge.

The first count of the declaration, as amended, is intentionally drafted, but as so amended it makes a pretense of charging the railroad company with negligence in having the car in question project outward. The sufficiency of the charge in that respect was not challenged in the court below, and we think it must be held to be sufficient to support proof, if any, of negligence in permitting said car to so project outward and in operating said car in that condition.

It is, however, insisted that there is no testimony tending to show that the car was in an improper condition prior to the accident.

True, there is no direct testimony of eye witnesses as to the precise condition of the car prior to the accident, or that it then projected outward, but there is evidence, which the jury, without acting unreasonably, might accept as tending to show that said car projected outward when it was loaded or received for transportation by the railroad company and while it was being transported by it prior to the accident.

The dimensions of the lumber with which the car was loaded are not disclosed by the testimony, but it is in evidence that when the car was examined it was found to be tightly loaded between its projecting sides, and that the nuts or heads upon the bolts by which the iron pockets were presumed to be securely fastened to the body of the car, were found to be drawn into the wood on the inside of the sill, thereby the pockets were enlarged and the stakes were spread outward. Again, the evidence tends to show that cars of like width with the car in question, if the same had been in good order, had repeatedly been hauled upon the same track without coming in contact with the frames, as they were placed at the time of the accident.

Whether or not the sides of the car projected as alleged before the car came in contact with the frames, and whether or not the railroad company was chargeable with

knowledge that its sides so projected, were questions which should have been submitted to the jury.

If the sides of the car so projected prior to the accident, and the railroad company was chargeable with knowledge of such projection, the duty was imposed upon the railroad company to exercise reasonable care to see to it that the track upon which it moved said car was in a reasonably safe condition to permit said car to be moved thereon without injury to persons rightfully near said car. Ill. St. L. & E. Ry. Co. v. Payton, 108 Ill., 334.

The railroad company had moved trains upon the track several times during each of the five days that the frames were standing in the same location, and whether or not it was chargeable with notice of the clear space between the track and said frames was a question of fact for the jury.

So far as the evidence discloses, the deceased had no duty to perform with reference to observing the condition of the cars which were being hauled by the railroad company upon the tracks in the plant of the equipment company.

Certainly, whether or not the deceased was in the exercise of due care for his own safety was a question of fact for the jury.

The trial court erred in giving the peremptory instruction to find the railroad company not guilty, and the judgment entered upon such verdict of the jury will be reversed and the cause remanded. The judgment against plaintiff in error is bar of his action against the equipment company will be affirmed.

Judgment in favor of Illinois Central Railroad Company reversed and cause remanded, and judgment in favor of Blue Island Car & Equipment Company affirmed.

AFFIRMED IN PART, REVERSED IN PART
AND CAUSE REMANDED.

1927/
265 - 19271.

MICHAEL MORRISON,
Appellee,

vs.

THE PEOPLES GAS LIGHT & COKE
COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COKE COUNTY,

191 I.A. 335

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

In an action in case to recover damages for personal injuries appellee recovered a verdict and judgment against appellant in the Superior Court for \$2,750.00.

Before The declaration, which consists of two counts, alleged that *appellee* was a laborer working in a ditch 2 feet deep and 3 feet wide; that boards were placed on each side of said ditch for the purpose of supporting the walls thereof, which boards were driven into the earth at the bottom of said ditch by means of mauls; that it was the duty of *appellant* to exercise reasonable care to furnish *appellee* and the other workmen there, mauls that were in a reasonably safe condition and repair; that *appellant* negligently furnished the workmen driving said boards with an unsafe maul, in that the head of said maul was insecurely fastened to the handle thereof, and was liable to slip from said handle; that *appellant* knew that said maul was unsafe and in a bad condition of repair; that while *appellee* was working in said ditch and while a co-laborer of *appellee* was driving one of said boards into the earth with said maul, the head of said maul slipped from the handle thereof and fell into said ditch striking *appellee* on the head; that said co-laborer of *appellee* was without negligence.

There is no controversy in the evidence bearing upon the material facts in the case, which, briefly stated,

are as follows: At about 2 o'clock in the forenoon of April 13, 1910, ^{McEwen} Appellee, who was employed as a ditch digger, had prepared the ditch for boards to be driven into the ground for the purpose of preventing the sides from caving in. Higgins, a gang foreman, directed McEwen to take a wooden maul, which was then laying on the earth bank, and drive the boards down. In response to such direction McEwen took the maul and drove the boards down while Appellee, stationed in the bottom of the ditch, held the boards in an upright position. After McEwen had been so engaged in driving down the boards for 15 or 20 minutes, and while he was swinging the maul, the head of the maul slipped or came off the handle, and struck Appellee on the head, causing the injuries complained of. Appellee had no occasion or opportunity to inspect the maul, and while McEwen had not inspected it carefully, the head of the maul appeared to him to be tight upon the handle. ²⁷ During the forenoon of the day preceding the injury to Appellee, the same maul had been used for the same purpose by Connors, another laborer, and while he was then so using it the head had come off the handle and fallen in the bottom of the ditch. Higgins, the foreman, then told Currey, who was employed by Appellant as a laborer and repair man, to replace the handle in the head of the maul, and Currey then did so replace the handle and drove a wedge in the end of the handle to keep it firmly in place in the head of the maul. The same maul was thereafter during the remainder of that day used in driving boards into the bottom of the ditch. The maul was examined by Higgins the following morning and the head was found by him to be properly fastened to the handle and held in place by a wedge driven into the end of the handle. ²⁸

The head of the maul was made of hard, seasoned wood, was 9 or 10 inches in length, 7 or 7½ inches in thickness, having a hole bored through the center, into which a

hickory handle was driven. The end of the handle which was driven through the hole in the head of the maul was split and a wedge was driven into each split end. Each end of the head of the maul was tightly fitted with an iron band one inch in width and one-fourth of an inch in thickness. The evidence tends to show that the head of the maul in question was somewhat battered on the ends, weather beaten and cracked, but that the cracks did not extend through the wood; that the iron bands were in place; that the battered condition of the ends and the cracks in the surface of the head did not affect the efficiency of the maul, or tend to cause the handle to become loose and come out of the head.

It is conceded by appellee that the maul in question was a simple tool and that no duty was imposed by law upon appellant to inspect it for the purpose of discovering whether defects appeared in it in the course of its use. Harris v. C. & E. I. R. R. Co., 257 Ill., 264.

It is, however, insisted by appellee that "where a master knows that a tool, whether simple or complex, is defective and unsafe to be used and with such knowledge directs a servant to work with such tool under circumstances where the use of such tool is liable to injure the plaintiff, the plaintiff is entitled to recover if he did not know and in the exercise of ordinary care could not have known that such tool was defective."

Assuming that the declaration in the case at bar states a cause of action predicated upon the liability of a master, under the rule contended for by appellee as above stated, the difficulty presented is that there is no evidence in the record which brings the case at bar within such rule. The uncontradicted evidence in the case not only negatives any knowledge on the part of appellant that the maul was

defective and unsafe when it directed McEwen to use the same, but shows affirmatively that said snail had been recently properly repaired by appellant, and that appellant had every reason to believe that it was in a reasonably safe condition for use.

The evidence discloses no negligence by appellant and the judgment will be reversed with a finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED
WITH FINDING OF FACT.

FINDING OF FACT:

We find that appellant was not guilty of the negligence charged in the declaration.

19313
805 - 19313.

HERMAN ULRICH, a minor, by
AUGUSTA ULRICH, his next friend,
Appellee,

vs.

KNICKERBOCKER ICE COMPANY, a
corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

191 I.A. 337

MR. PRESIDING JUSTICE BAUME
DELIVERED THE OPINION OF THE COURT.

This is a suit by Herman Ulrich, a minor, by his next friend, against the Knickerbocker Ice Company, a corporation, to recover damages for personal injuries. A trial by jury in the Superior Court resulted in a verdict and judgment against the defendant for \$8,250, to reverse which judgment it prosecutes this appeal.

~~The only count of the declaration upon which the case was submitted to the jury alleged that on December 1, 1902, plaintiff, aged 14 years, was lawfully walking upon and along Archer avenue, near its intersection with Blake street; that the defendant was then and there possessed of an ice wagon and of horses grazing the same, which were then and there under the care of certain servants of the defendant who were then and there driving the same upon and along said Archer avenue near its intersection with said Blake street; that it became and was the duty of the defendant by its said servants to drive, manage, and control the said horses so attached to said ice wagon with reasonable care, along and upon said street, and not wantonly, maliciously and wilfully strike at persons who might then be walking upon said street, yet the defendant did not regard its duty in that behalf, but on the contrary thereof, by its said servants, wantonly, maliciously and wilfully struck at the plaintiff who was then~~

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lawfully upon said street with all due care and caution for his own safety, with the whip, then and there in the hands of the servant of the defendant, causing the plaintiff in his endeavor to escape the said blow so directed at him to jump out of the reach of the said whip, and in so doing the rope which was attached to the plaintiff's arm caught in the wheel of the defendant's wagon, throwing the plaintiff down to and upon the ground there, dragging him along said street so that he sustained severe internal and external injuries, etc. *u*

In the view we are impelled to take of the case it is determinable as a matter of law upon the facts stated most favorably for appellee, in his brief, as follows: "The evidence introduced on behalf of plaintiff showed that plaintiff was then about fourteen years and two months of age. While returning from an errand on which he had been sent by his mother in company with his cousin, who was then about nine years and ten months old, they had crossed the street car tracks in Archer avenue, in a southerly direction and plaintiff was standing about midway between the south or east-bound track and the south curb, swinging a lasso over his head preparatory to throwing it at his cousin, who was then some eight or nine feet ahead of him, the lasso being tied about plaintiff's left wrist. The defendant's ice wagon was coming from the south toward them and when it reached the place where the boys were, the driver of the team, who was sitting on the side nearest the boys cursed the boys and struck the plaintiff over the back with a whip, causing the plaintiff in his sudden fright to let go of the lasso, which he had been swinging over his head and causing it to fly onto the hub of the right hind wheel of the defendant's wagon. As the wagon went on it wound the lasso around the hub, drawing the plaintiff up into the wheel, breaking the plaintiff's arm in several places."

Having the question whether or not the alleged wrongful act of the defendant's servant was the proximate cause of the plaintiff's injuries, it is clear that the alleged wrongful act of defendant's servant was not within the scope of his employment. There is no pretense that the plaintiff was, at the time in question, attempting to get upon the wagon or that he was obstructing or attempting to obstruct or interfere with its movement, or that defendant's servant struck the plaintiff for the purpose of preventing the latter from doing any like act, or in retaliation of anything the plaintiff had done or had threatened or purposed to do. *End!*

So far as the evidence discloses, the defendant's servant, if he in fact struck the plaintiff, did so wantonly and maliciously.

Where a servant commits an act which causes injury to another, the master will not be liable if the servant, in causing the injury, is not acting within the scope of his employment. To hold the master responsible for the acts of his servant, whereby injury is caused to another, such acts must be within the general scope of the servant's employment done by the servant while engaged in his master's business, with a view to the furtherance of that business. G. M. & St. P. Ry. Co. v. West, 135 Ill., 320; Ho. Chgo. City Ry. Co. v. Smith, 135 Ill., 615; Chicago Terminal R. R. Co. v. Schiavone, 216 Ill., 375; Chicago City Ry. Co. v. Cooper, 128 Ill. App., 628; Smith v. Lombard Coal Co., 153 Ill. App., 103; Barlow v. Chicago City Ry. Co., 160 Ill. App., 243.

Controlled by the well settled rule of law applicable to the facts in this case, as claimed by appellee, appellant is not responsible for the alleged injuries to appellee.

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The judgment is reversed with a finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED
WITH FINDING OF FACT.

FINDING OF FACT:

We find that the act of appellant's servant, alleged to have caused the injury to appellee, was not done within the general scope of such servant's employment, while engaged in appellant's business, with a view to the furtherance of that business.

2018
ECCIS.

269

WILLIAM M. CARPENTER,
Appellee,
vs.
CHARLES S. KOWLANDER,
Appellant.

INTERLOCUTORY APPEAL
FROM CIRCUIT COURT,
COOK COUNTY.

1911 A. 340

MR. PRESIDING JUSTICE BAIRD
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Circuit Court overruling appellant's motion to dissolve a temporary injunction granted upon the overruling of appellant's general and special demurrer to appellee's original bill as amended, filed March 25, 1914, and to the supplemental bill filed January 5, 1914.

Briefly stated, the material averments of the bill are that appellee is the owner of a certain farm, which, on December 8, 1911, by a written lease, he devised to appellant, for the term of three years from March 1, 1912; that said lease contains a reservation to appellee as follows: "Said Carpenter hereby reserves the house now occupied by him and family with front and back yards with convenient room for access to and from and about the same, also reserves the barn known as the North Barn on said premises with convenient room for access and use of same, also reserves the orchard and nursery on said farm and included access * * *"; that appellant went into the occupancy of said premises, under said lease, and now occupies the same; that the back yard mentioned in said reservation clause in said lease is located behind the house back to a tight board fence which separates said back yard from the premises leased to appellant; that at the time said lease was executed there was a circular tank ten feet in diameter so placed as to be convenient for use as a watering

place for stock kept in either of the barns on said premises and for general farm purposes; that about one-half of said tank was and is located upon the portion of said farm reserved by appellee and the other half of said tank was and is located upon the portion of the farm leased to appellant; that about one-half of said tank is on either side of said tight board fence and said tank was and is supplied with water from a windmill standing on the portion of the farm leased to and occupied by appellant. The bill further alleges that by the terms and provisions set forth in said lease the said water supply as so furnished by said windmill and tank at the time of the execution of said lease, was reserved by appellee; that at the time of and in connection with the execution of said lease, the matter of said water supply, as then furnished by said windmill and tank, was discussed by the parties thereto, and it was then specifically stated by appellee and appellant that said water supply was included in the reservations set forth in said lease and should be so considered by and between said parties; that appellant then stated, in connection with the execution of said lease, that said reservations set forth therein should be so construed as to assure to appellee the undisputed right to said water supply during the term of said lease, and under said interpretation of the provisions of said lease, appellee, relying upon the same, delivered possession of said premises to appellant; that both of said parties did so use said water supply from said tank for all the purposes aforesaid without dispute or question until March 1, 1913, when appellant refused to allow appellee to use the same, and has resisted appellee's attempts to use the same for his stock and other purposes; that appellee has no other water supply on said premises from which he can furnish water for his stock and household, and that appellee has about six head of cattle and six head of horses on the portion of the premises reserved

to him by said lease; that unless appellant is restrained from further depriving appellee of said water supply and use of the portion of the premises reserved by him, he will suffer irreparable injury at the hands of appellant; that appellant is insolvent. ^{supplemental} The bill prays that appellant be restrained from interfering with appellee's use of the water supply from said tank and windmill.

Subsequent to the filing of the original bill on March 11, 1913, and prior to the filing of said bill as amended, appellee on January 5, 1914, filed a supplemental bill alleging that on December 30, 1913, appellant, contrary to his agreement made shortly after the filing of said original bill, not to further interfere with appellee's use of said water supply, constructed another water tank on the portion of the premises leased to him, and cut-off the water supply from the tank which had theretofore been used by said parties in common and connected the pump with such other water tank constructed by appellant, thereby discharging all the water furnished by said pump and windmill into said newly constructed tank, and depriving appellee of the water supply reserved to him by the terms of said lease. The supplemental bill prayed that appellant be restrained from further depriving appellee of said water supply and from continuing to divert the same from the tank installed and connected with said windmill at the time said lease was executed. The demurrer interposed by appellant to said original and supplemental bills was sustained by the court and appellee was given leave to file an amended bill. An amendment was filed to said original bill, but no leave was asked or granted to amend the supplemental bill. The supplemental bill is, therefore, out of the case. The injunction as granted follows the language of the prayer in the supplemental bill.

Exceptions or reservations embodied in a contract for the benefit of the party who makes them, will, in cases of doubt or ambiguity, be construed least favorably in favor of such party. Richmond v. Brandt, 118 Ill. App., 624.

In Littlejohn v. C. F. & L. R. Ry. Co., 330 Ill., 364, it is said: "In order to except property included in the description of a deed from the operation of a grant, the intention so to do must be expressed in clear and certain terms."

The clause in the lease reserving a portion of the premises to appellee, the lessor, is clear, certain and unambiguous, and the bill, as framed, contains no allegations respecting the surrounding circumstances or situation of the parties which would authorize a court of equity in construing said clause to add to or enlarge the scope of the exceptions or reservations as therein expressed.

It is suggested by appellee that the windmill, pump, and well on the portion of the premises leased to appellant, together with the tank, which is in part upon the portion of the premises reserved by appellee, are in the nature of fixtures running with the land, and that a right to the use of the same accrues to appellee by reason thereof. The bill does not set forth the manner in which or means whereby the water is carried from the pump to the tank, or how the pipe, if it be a pipe, which so carries the water is connected with or fixed to the pump and tank, and in the absence of specific allegations in the bill with respect thereto, it cannot be determined whether or not such instrumentalities are fixtures. If, in fact, they are fixtures, a different question would be presented.

It is obvious that, in the main, the bill predicated a right to relief upon an alleged verbal agreement entered into between the parties contemporaneous with the written

contract under seal. Such a contract cannot rest partly in writing and partly in parol, and evidence of a parol agreement antecedent to or contemporaneous with the execution of such a contract is inadmissible to vary its terms. Frank v. Cooke, 173 Ill., 308; Clark v. Mallory, 188 Ill., 217. This rule is elementary.

The doctrine of practical construction sought to be availed of by appellee, may only be properly resorted to when the terms of the contract are uncertain and ambiguous. Vigmont St. Church v. Weiss, 104 Ill., 308; Street v. Chicago N. & W. Co., 157 Ill., 205; Muller v. Northwestern Univ., 195 Ill., 228; McLean Canby Coal Co. v. City of Bloomington, 254 Ill., 30.

The order is reversed. ~~REVERSED~~

~~REVERSED~~

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10193
100 - 19102.

ALBERT A. NEWMAN,
Defendant in Error,
vs.
NEWMAN CLOCK COMPANY, a corporation,
Plaintiff in Error.

270
PENSION TO

MUNICIPAL COURT

OF CHICAGO.

1911 A. 343

MR. JUSTICE BRAVER DELIVERED THE OPINION OF THE COURT.

On the 9th day of February, 1910, the parties to this suit entered into a written contract in which, among other things, it was provided:

"Sixth. Said Newman Clock Company hereby employs said Newman as consulting engineer, for a term of ten years beginning the first day of January, 1910, and said Newman accepts such employment, upon the conditions hereinafter set forth; said Newman Clock Company shall pay said Newman three thousand dollars (\$3,000) per year for the first five years, in monthly instalments of two hundred and fifty dollars (\$250) each, on the first day of each month, and two thousand dollars per year for the second five years, in monthly instalments of one hundred and sixty-six and 2/3 dollars (\$166.67) on the first day of each month. But should said Newman fail to comply with any of the terms and conditions in this agreement set forth, then and in that event, his right to receive the salary in this paragraph set forth, shall at the option of the Newman Clock Company, cease and determine, * * *.

"Eleventh. All suits brought by said Newman against the Newman Clock Company and its former directors, or any of them, and by said Newman Clock Company against said Newman shall be forthwith discontinued without costs as to either party as against the other; * * *.

On March 10, 1910, Newman, the defendant in error, began his suit to recover \$750 claimed to be due him under the terms of the above quoted sixth clause of that contract. The trial resulted in an instructed verdict against the defendant awarding the plaintiff's damages at \$750. Judgment was entered on the verdict. The record is brought here by writ of error.

Plaintiff in error defended the case on the theory that defendant in error had never performed the above quoted

eleventh clause of said contract in several particulars, among others, that he did not forthwith, or at all, discontinue all suits brought by him against plaintiff in error. The particular suit which it is claimed he failed to discontinue was the case of Albert A. Newman v. Western Clock Company et al., which at the time the contract in question was entered into was pending in the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois, and stood on leave granted to Newman to amend his amended and supplemental bill by February 10, 1910, a demurrer to his original and to his amended and supplemental bill having been theretofore sustained. After the contract sued on was entered into Newman went into the United States Circuit Court and moved to have the order granting his leave to amend his amended and supplemental bill set aside and for leave to stand by his amended and supplemental bill. This motion was allowed and the following order was entered:

"Therefore, on motion of the complainant it is

Ordered, that so much of the order entered herein on January 11, 1909, as gives to the complainant leave to amend his amended and supplemental bill be set aside; and that the order entered herein on February 4, 1910, extending the time to amend said amended and supplemental bill to February 10, 1910, be set aside; and that the complainant have and is hereby given leave to stand by his said amended and supplemental bill. * * * * *

"And the complainant now here in open court electing to stand by his said amended and supplemental bill, it is further Ordered, Adjudged and Decreed, that the said amended and supplemental bill be and the same is hereby dismissed out of court of jurisdiction; and it is further Ordered, Adjudged and Decreed, that the defendants do have and recover of and from the complainant their costs of suit to be taxed by the clerk."

Within the time provided by the Federal statutes Newman filed his petition for an appeal from the order above quoted to the United States Circuit Court of Appeals, which was allowed and his appeal bond was approved. Later he filed in that court the transcript of the record and his

brief and argument. That appeal was pending when Newman began his suit in the Municipal Court, the record of which is now before us.

The contract used on was mutual. The sixth clause thereof above quoted, under which Newman seeks to recover, was entered into on the part of the Newman Clock Company in consideration of the performance by him of the terms of the eleventh clause thereof, also above quoted. It requires no citation of authorities to sustain the proposition that Newman can not recover under the covenants contained in the said sixth clause, if he has not kept the covenants contained in the said eleventh clause, which were to be kept and performed by him.

By the terms of the eleventh clause of that contract Newman binds himself to "forthwith discontinue" all suits brought by him against the Newman Clock Company. The term "discontinue" was defined in Hudgin v. Southern Ry. Co., 27 S. C., 403, to be "the same applied to the voluntary withdrawal of a suit by a plaintiff." In Ex parte Hagan, (Ala.), 30 So. Rep., 732, the court said: "A discontinuance is, in substance and effect, an abandonment of the moving party of his pending case". In Ex parte Sussman and Yal, First Ins. Co., 8 Pa. Dist. Rep., 172, the court said: "A discontinuance means no more than a declaration of the plaintiff's willingness to stop the pending action. It is neither an adjudication of his cause by the proper tribunal, nor an acknowledgment by himself that his claim is not well founded." In McGuire v. Hay, 25 Tenn. (3 Humph.), 419, it is said: "A discontinuance is the result of some act^{done} or omitted by the plaintiff, which legally withdraws his case from the power and jurisdiction of the court." In Connors v. McMichie, (Pa.) 7 Phila., 217, it is said: "A discontinuance does not, like a retraxit operate as an extinguishment of the cause of

action, but leaves the plaintiff free to bring another suit." In Thurston v. James, 48 Mo., 335, it is said: "A discontinuance, in practice, is the same as a dismissal, and means that the cause is sent out of court." In Davis v. Hammond, (Mich.) 42 N. W., 590, an instruction to the jury using the terms "dropped" and "discontinued" synonymously was approved. For reasons of their own the Newman Clock Company evidently wanted the suit in the United States Court stopped at once and without adjudication, therefore they contracted with Newman that it should be "forthwith discontinued", by which term we think the parties undoubtedly understood and intended that that suit should go no further, but should then and there end. While by causing the order for leave to amend his amended and supplemental bill to be vacated and by causing the record to show that he elected to stand by his amended and supplemental bill, and by permitting the case to be dismissed for want of jurisdiction at his costs, Newman may have accomplished substantially what was aimed at by the eleventh clause of the contract, if he had done nothing more, it can not be doubted that by perfecting his appeal and taking the record to the Court of Appeals and there insisting on a reversal of the order appealed from, he violated not only the letter but the spirit of the contract, and instead of forthwith discontinuing the cause he indefinitely perpetuated the litigation to the certain damage of the Clock company, at least to the extent of the costs necessarily incurred in the Court of Appeals, to say nothing of depriving it of the particular thing it contracted for, i. e., an end of litigation.

This is the view plaintiff in error evidently took of the matter, for after the order of dismissal had been entered in the case, it continued to pay defendant in error the amounts stipulated for in clause six of the contract up to the time when by his perfecting his appeal from and urging the

reversal of the order, he manifested his purpose to perpetuate the litigation. When his purpose so to do had been so manifested, it refused to pay him any more money on the contract.

Newman urges here that his purpose in appealing that case was to permit a proper adjudication as to the disposition of the funds in the hands of a receiver that had been appointed in that case. That is a matter he should have considered at the time of making his contract with the Clock Company, and can in no way justify him in failing to perform the contract as he deliberately made it. He contracted to forthwith discontinue that case. He had it in his power to do so. Instead of doing so, he deliberately perpetuated it by his affirmative action. Having violated his contract he can not avail himself of so much of its provisions, as were made for his benefit.

The judgment of the Municipal Court is, therefore, reversed.

JUDGMENT REVERSED.

19229
234 - 19229.

B. A. LYNCH,
Plaintiff in Error,

vs.

CHARLES WIFLER and BERTHA WIFLER,
Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1911 A. 344

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Charles and Bertha Wifler entered into a contract on April 17, 1909, with Mary and Emil Marshall, whereby they agreed to pay to the said Marshalls the sum of \$1,200 in installments maturing at intervals during several years, the last one maturing in October, 1913, and assumed and agreed to pay a certain mortgage for \$2,200 theretofore given by the Marshalls on certain premises in the City of Chicago, and described in the contract, in consideration for which the Marshalls agreed that when the said installments were all paid, they would convey to the Wiflers the said premises in fee, clear of all incumbrances, except the said \$2,200 mortgage. The premises in question had theretofore been occupied by the Marshalls for several years as their home. Upon the execution of this contract the Marshalls surrendered to the Wiflers the possession of the said premises and they were still in possession thereof when this suit was begun. This contract was filed for record on December 12, 1911. On May 3, 1910, the Grand Brewing Company obtained a judgment by confession in the Circuit Court of Cook County against the Marshalls for \$217.12 and costs. An execution was issued on that judgment and was on August 1, 1910, returned "no part satisfied". On August 12, 1912, an alias execution was issued and was levied on the premises in question, and on September 17, 1912, the said premises were sold under this execution to the Grand Brewing Company for \$275,

and that company held the certificate of sale at the time this suit was commenced. On May 18, 1911, the Marshalls borrowed of one Mary H. Fox, the sum of \$350, and assigned to her their interest in the contract above mentioned as security for that loan. On April 17, 1912, Mary H. Fox assigned to H. A. Lynch the said contract, and three days later she brought suit in the Municipal Court against the Eiflers to recover the amount then due on said contract, which it is admitted was \$346.50. The case was tried by the court without a jury and resulted in a finding and judgment for the defendants. This writ of error is presented to reverse that judgment.

The Brewing Company is not a party to the suit, but the attorney who appears for the Eiflers has ably presented its claims here in support of the correctness of the judgment of the Municipal Court. Defendants in error were the owners of the equitable title to the premises in question (Baldwin v. Paul, 74 Ill., 37,) and were in possession of the same before and at the time the judgment in favor of the Brand Brewing Company was obtained against the Marshalls. While the naked legal title remained in the Marshalls, it was as trustees for the use of the Eiflers. Fuller v. Bradley, 160 Ill., 51; Lebard v. Chicago Final Corporation, 94 Ill., 477. The only beneficial interest the Marshalls had in the property when the judgment was obtained was to hold the title until the purchase price should be paid according to the terms of the contract. Geerley v. McCabridge, 154 Ill. App., 135; Sutherland v. Guzman, 100 Ill., 339; Stewart v. White, 96 Ill., 107; Conner v. Annett, 25 Ky., 303; Chisholm v. Laird, 57 Ill., 124. Any interest acquired after the Eiflers came into possession of these premises as the equitable owners thereof was subordinate and subject to their rights. Wells v. Blair,

95 Ill., 39. The possession of defendants in error was notice to the world of all their rights in the property. By such possession the purchaser of the property at the sale under the execution issued on the judgment was charged with notice that before the judgment was obtained the Eiflers were the equitable owners of the property and had paid part of the agreed consideration therefor and that the title of the Eiflers to this property was paramount to all subsequently acquired interests. It follows not only that the judgment to satisfy which these premises were sold was no lien thereon, but that the purchaser knew it. The sale of the premises was, therefore, void as against the Eiflers and the purchaser thereof acquired, as against them, no enforceable interest in said premises. Walsh v. Wright, 101 Ill., 179; Farmers' National Bank v. Sparling, 117 Ill., 273.

As the title of the Eiflers to the premises contracted for is unaffected by the judgment in question and the purported sale to satisfy the same is void as against them, such judgment and purported sale furnish no reason why they should not pay the installments of purchase money as they fall due and perform all the covenants contained in the contract sued on, to be kept and performed by them.

It is not necessary for us here to determine the question whether the money due from the Eiflers to the Marshalls is exempt to the amount of \$1,000, as being the proceeds of the sale of homestead interest of the Marshalls, for the reason that no attempt to subject the balance due on the contract or any part thereof to the payment of the Grand Brewing Company judgment has been made.

During the trial it was agreed between the parties that the amount due on the contract and to be recovered by the plaintiff in that suit, if anything was recovered, was

\$346.50, and judgment for that amount against the defendants should have been entered by the trial court. Of that amount \$300 was for installments of the principal, \$150 of which was due October 17, 1911, and \$150 of which was due April 17, 1912, and \$46.50 was for accrued interest. Since that time two years additional interest, or \$50, has accrued on the \$300 of unpaid principal, making the total amount to be recovered in this suit \$376.50.

The judgment of the Municipal Court is, therefore, reversed and judgment is entered here for \$376.50 and for costs in both courts.

JUDGMENT REVERSED
AND JUDGMENT HERE.

19323
313 - 19323.

OLIVER K. BUNKER,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

191 I.A. 364

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

The sole question presented for review by this appeal is whether the verdict is so manifestly contrary to the weight of the evidence as to require the reversal of the judgment. On the main question as to whether appellee received the injuries of which he complains, at the time and in the manner claimed by him, the testimony is in direct and irreconcilable conflict. If the story told by appellee is true, he attempted to board a Halsted street car of appellant that had stopped at 28th Place on signal to receive passengers. While attempting to board the car and before he had reached the platform the car started with a violent jerk and he was thrown down partly on the platform and partly off and was by the force of the motion of the car rolled off from the platform into the street with such force as to cause him to roll over in the street, resulting in the fracture of a bone in one of his legs. In these particulars he is corroborated by the testimony of one eye witness who apparently was disinterested, and by the undisputed fact that on that day he suffered the fracture complained of. It is also corroborated by the testimony of the conductor of a car which he says he boarded soon after the accident, who testified that he complained to him of having been thrown from a car and hurt about the time and place testified to by appellee, and also by a doctor who testified to being called to treat

appellant and that he found the fracture complained of.

If the testimony of the conductor in charge of the car in question is ~~true~~ ^{was}, ~~appellant~~ ^{was} did not attempt to board the car and was not thrown from the car at all. His testimony is in a way corroborated by the ~~testimony~~ ^{negatives} of some other witnesses who were in a position in which they might have seen the occurrence, if it had taken place, who say they did not see it occur. Appellee is contradicted by the testimony of the conductor to whom he complained and whom he asked to report the accident to the company, who testified that appellee then pointed out a different place in the street where he then said the accident happened and that he then made statements in conflict with his testimony as to how it happened. This ~~appellee~~ ^{denied}. Counsel for appellant have also pointed out numerous things in the testimony of appellee and his main witness, which they ~~are~~ ^{are} inherently improbable. These things relate mainly to the manner in which appellee testified he attempted to board the car; the way in which he fell and where he went and what he did before and after the accident, which throw no real light on the vital questions in the case, viz.: Was he thrown from the car at all, and if so, was it the result of the negligence of appellant or of himself? We have carefully read the abstract of the evidence and considered the questions presented and are unable to see any inherent improbability in the story told by appellee and his witnesses. The question presented to the jury resolved itself into one of the credibility of witnesses and the weight to be attached to their testimony. If the story of appellee was true, and the jury evidently believed it to be so, he was certainly entitled to recover. If the story of the conductor was true,

no liability on the part of appellant existed. We feel that the conclusion reached by the jury is justified by the evidence.

The judgment of the Circuit Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

19363
349 - 10003.

THOMAS FITZGERALD, a minor, by
SARAH FITZGERALD, his next friend,
Appellee,

vs.

MARSHALL E. CAMPBELL, as receiver
of CHICAGO UNION TRACTING COMPANY,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

191 I.A. 366

MR. JUSTICE CRAVER DELIVERED THE OPINION OF THE COURT.

Appellee, at the time of the occurrence made the basis of this action, was about six and one-half years old. He, with his mother and a younger brother, on June 30, 1905, were passengers on a street car of appellant. The car stopped at an appropriate and customary place to discharge passengers. The mother of appellee, after placing her younger son on the pavement, was attempting to assist appellee from the car when the conductor gave the motorman a signal to go ahead and the car started throwing appellee and his mother to the pavement. The undisputed evidence of the father and mother of appellee and a nurse who attended him shows^{2d} that he was bruised on the hip, groin and knee and for a long time was sore in those parts, and that he was confined to his bed the larger part of the time for a month or more; that the bruise on the knee became infected and did not heal for several weeks; that parts of his body near the bruise on the hip became black and blue and there was a swelling in the groin; that he from the moment of the injury has walked with a limp; that a year or more after the accident the mother of appellee claimed to have noticed a curvature of his spine and an apparent shortening of one of his legs, and that prior to the injury he was a sound healthy boy. The preponderance of the evidence tends to show that the neck of the right femur between the ball of

the hip joint and the great trochanter was shorter than natural by a half-inch, and that where the right femur connects with the pelvic bone that bone is higher than its counterpart on the left side of the body.

Whether these conditions were all the result of injuries received at the time of the fall from appellant's car opinions widely differ. However that may be, there seems to be no basis for doubt that appellee was thrown from the car of appellant to the pavement because of the starting of the car while he, with the assistance of his mother, was in the act of alighting therefrom; that the car was thus started because of the negligent order of the conductor in charge thereof, and that appellee was bruised and injured by being so thrown from the car. Neither can it be doubted that he is entitled to recover compensation for all damages suffered by him of which such starting of the car was the proximate cause. As we understand the argument of counsel for appellant, it is not denied that appellee was thrown from the car, as claimed by him and was injured to some extent, or that he is entitled to some damages, but he says, "it is claimed by defendant (appellant)* * * * that the injury received by plaintiff (appellee) as a result of his fall on June 30, 1905, was of a trivial nature which soon disappeared." The jury awarded appellee \$2,750 damages and judgment for that amount was in due time entered. That is the judgment appealed from.

Whether the curvature of the spine and the condition of the bones that has resulted in the apparent shortening of the right leg and the lameness of appellee are conditions chargeable to the fall is seriously contested.

The evidence for appellee fairly tends to show that the lameness of appellant began immediately after his fall;

that it continued from that time to the day of the trial which was about six and one-half years thereafter; that the same thing that caused the lacerations caused the abnormal condition of the leg, hip and spine of appellee. The testimony of appellant's experts tends to show that such conditions might be the result of other causes and some of it tends to show that it could not have been the result of the fall described. The jury in determining the reasonableness of the two theories were warranted in taking into consideration the fact that while some of appellant's witnesses gave other causes than the fall from the car that might have produced some of the conditions found in appellee, there is no proof that he was ever subjected to the influence of such other causes. When either of two causes may produce a result, and only one of them is shown to have been present, it does no violence to reason to conclude that the cause shown to have been present at the time the result is produced is responsible for it. We think the verdict is fairly supported by the evidence.

Two instructions were given at the instance of appellee which told the jury that it was the duty of appellant to exercise for the safety of its passengers the highest degree of care "consistent with the operation of the road", and the mode of conveyance adopted. These instructions were defective. The rule is that such carrier must use the highest degree of care for the safety of its passengers consistent with the practical operation of the road. If there was any doubt about whether the act of the conductor in causing the car to start while appellee, with the assistance of his mother, was attempting to alight therefrom being negligence under any view of the duty of appellant to its passengers, these instructions would likely require a reversal of the judgment, but there is no such doubt. It is clearly the duty of a

carrier when its car has been stopped to permit passengers to alight therefrom, to see to it that the same is not started while such passengers are in the act of so alighting. That duty the conductor in this instance did not perform. If the charge here had been that the conductor acted in wilful disregard of the safety of its passengers, we think the evidence would have supported the charge. On the facts here disclosed the fault in these instructions could not have harmed appellant.

In an instruction regarding the elements the jury might take into consideration in determining whether appellee had proved his case by a preponderance of the evidence, the court used the words "should take into consideration". The fault pointed out being that the word "may" or some equivolent word should have been used instead of "should". This instruction would have been better framed as suggested by appellant, but a like fault in instructions has frequently been held not to be reversible error. Lyons v. C. & N. Ry. Co., 232 Ill., 75, 84; Thompson v. Burr, 243 Ill., 312; Chicago Union Trust Co. v. Y. Ry., 221 Ill., 641. See also Boeing v. Burck, 227 Ill., 71-72.

The following instruction was also given:

"The jury are instructed that they, under the instructions of the court and from the evidence, are the sole judges of all the questions of fact in this case, and the court does not, by any instruction given the jury in this case, intend to instruct the jury how they should find any question of fact."

The fault found in this instruction is that it makes the jury "the sole judges of all questions of fact." The instruction informs the jury that they are, "under the instructions of the court and from the evidence", the sole judges of the facts and is not faulty in the respect pointed out. The instructions condemned in C. B. & C. R. R. Co. v. Greenfield, 22 Ill. App., 424-432, in West Chicago St. Ry. Co.

v. Shannon, 100 Ill. App., 100, and in G. H. T. Co. v. Birnd, 114 Ill. App., 479, 483, cited by appellant, were faulty because they failed to include proper reference to the instructions of the court. Those condemned in E. H. S. St. Ry. Co. v. Babson, 93 Ill. App., 98, in G. O. Ry. Co. v. Horvack, 94 Ill. App., 178, and in Maxwell v. C. & N. I. Ry. Co., 140 Ill. App., 156, omitted proper reference to the evidence.

It is lastly suggested that the judgment is excessive. Sufficient reference to the extent of the injuries which the jury found appellee had sustained has been made to show that if the damages allowed are disproportionate to the injuries sustained, they are too small.

Finding no error in this record, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

156 - 19348.

DAN BALDINO,
Defendant in Error,

UNKNOWN TO

vs.

MUNICIPAL COURT

H E
ROSE HANNEBERRY,
Plaintiff in Error.

OF THIS CO.

191 I.A. 368

STATEMENT OF THE CASE. In 1910, the defendant, Mrs.

Rose Hannesberry, owned an apartment building and a cottage on Spruce and Locust streets, Chicago, and, desiring to sell the same, gave the price and terms to several real estate brokers, including the plaintiff, Dan Baldino. The price named was \$30,000. Plaintiff put the price on a card, placed the card among his office files, and submitted the property to several prospective purchasers, without result. In 1911, the cottage was sold by the defendant, and thereupon the price for the apartment building was reduced to \$25,000. This fact was communicated to the plaintiff and he noted it on the card in his office. The plaintiff testified that about that time, one Joe Viviano, a dealer in macaroni, living in Chicago, told the plaintiff he was looking for a building for his brother, Sam (or Salvatore) Viviano, who, at that time, lived in St. Louis, Missouri; that plaintiff and his salesman showed Joe Viviano several pieces of property, including that of the defendant, and that Joe Viviano then said he would do nothing until his brother came to Chicago. Joe Viviano testified that plaintiff showed him "many properties;" that he wanted "to buy me and my brother together a residence property" and that when plaintiff pointed out defendant's building to him, "I say it is not the house that we want - it don't suit us, this place." He denied that he acted as his brother's agent, and denied that he ever told plaintiff that such was the fact. Sam Viviano arrived in Chicago early in the year 1912. Plaintiff claims that he then called upon him and asked him whether his brother Joe had spoken to him about "that corner I showed him;" that on receiving a reply in

the negative, the plaintiff made an appointment to show him the property, and that the next day he did "show" him the property, by driving him around in a buggy and pointing out three pieces of property, one of which was that of the defendant. The plaintiff also claims that on another occasion, in the summer of 1912, he walked with Sam Viviano to the defendant's property and again called his attention to it, from the sidewalk. He admitted that he never took either of the Vivianos inside the building, at any time. Nothing came of these efforts on the plaintiff's part to sell the property.

+ The plaintiff did not report any of these facts to the defendant, and, so far as the record discloses, nothing further was done by him towards effecting a sale to either of the Vivianos until after he learned that Sam Viviano had been induced by another broker, a woman named Mrs. Emily Badali, to examine the property, as hereinafter stated.

The defendant was out of the city from June, 1912, until October 7, 1912. In September, 1912, Mrs. Badali, who was acquainted with Mrs. Sam Viviano, was endeavoring to sell her home property on Congress street, and while returning from a visit to that property met one of the defendant's tenants on the street. In talking to him, they learned that defendant's property was for sale. They went to the building and looked through one of the flats. The next day, they sought the defendant's son, who took them through the building. A few days later, at Mrs. Badali's instance, both Mrs. Viviano and her husband examined the property. This was the first time he had seen the inside of the building, and soon after, he made a further examination with the assistance of a contractor and plumber, whom he employed for that purpose. Some negotiations followed with the son of the defendant, and later, upon her return to the city, with the defendant in person, which

resulted in the defendant's accepting an offer of \$25,000 made by Viviano. A written contract to that effect was prepared by Viviano's lawyer on October 12, 1912, but owing to some dispute about "pro-rating" taxes and other small matters, it was not signed until October 15, 1912.

The plaintiff testified that on October 6th or 7th, he called on the defendant and told her that he had a customer named Viviano, who would pay \$24,500 for the property, and that the defendant replied that she would not take less than \$25,000. He did not claim that he ever mentioned Viviano's name to the defendant prior to that time. The defendant and her daughter both testified that the defendant did not return to the city until October 7th; that the next day after she returned, Sam Viviano and Mrs. Badali called at defendant's house, and again a day or two later, as above stated, and that it was not until after their second visit - which was on October 9th or 10th - that the plaintiff made the visit he claims he made on October 6th or 7th. On October 12, 1912, plaintiff wrote a letter to the defendant, saying that he had had "a long talk with Viviano Bros.;" that "he" had said "he" would not pay over \$25,000, and that the plaintiff had told "him" that defendant would not consider less than \$25,500; that "this property has been submitted to these people out of my office in the last year or so;" that "one of their brothers accompanied the man I had working for me at the time," who "took them over and showed the property, but he did not take them through;" that "they were not taken through the building because you were away;" and that he understood from Viviano that "there is a girl between the deal." The letter concludes by asking defendant to let him know "the lowest price on the property." This letter was received by defendant after the contract had been prepared, but before it was signed. She gave the letter to her lawyer. After taking from Sam Viviano an affidavit as to the facts, the sale was consummated

on October 24, 1918, and defendant paid a full commission to Mrs. Sadall. Plaintiff brought suit in the Municipal court on the theory that he had found a purchaser who was accepted by the defendant. Upon a trial before the court without a jury, the plaintiff recovered a judgment for \$335, and defendant sued out this writ of error.

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

The main contention of the defendant is that the evidence is insufficient to support the judgment. The whole case for the plaintiff rests upon the plaintiff's own evidence, uncorroborated save in one or two unimportant particulars. He does not claim that he ever introduced the buyer and seller, and there is no evidence fairly tending to prove that anything he did or said accomplished anything towards bringing them together. His sole claim is based upon the fact - if it be the fact - that he first called the Vivianes' attention to the property. He admitted, however, that when the property was first listed with him, and during the two years in which it was so listed, he knew that the property was also listed with other real estate brokers. The principle is well established, that where an owner of property employs several real estate brokers to effect a sale of this property, the broker whose efforts actually bring about the sale is the broker who is entitled to the commission, provided the owner acts in good faith. (Whitcomb v. Bacon, 170 Mass. 479; Sibbald v. Batholomew Co. 82 N.Y. 379; McGuire v. Carlson, 61 Ill. App. 303; Hubbell v. Haidrich, 142 Ill. App. 304.) When several brokers are thus employed and one of them sues for commissions, the rule is that even though he proves that he commenced negotiations with a party who subsequently purchased the property, still he is not entitled to recover unless he shows further, by a preponderance of the evidence, that he "actually brought about a consummation of the sale, or was prevented from so doing by the

fraud, procurement or misconduct or fault on the part of the defendant." (Ray v. Taylor, 181 Ill. 226, 228.) We are unable to find in the record any evidence fairly tending to prove that the plaintiff "actually brought about a consummation of the sale," or any evidence fairly tending to show that the defendant did not act in good faith in selling the property to Viviane through the agency of Mrs. Sadali. It follows that the proof fails to make out a case in favor of the plaintiff.

For the reasons indicated, the judgment of the Municipal court will be reversed and the cause remanded.

REVEREND JUSTICE.

305 - 19704.

MARY GERALDINE NEVILLE,
Plaintiff in Error,
vs.
CITY OF CHICAGO,
Defendant in Error.

MADE TO

SUPERIOR COURT

COOK COUNTY.

1911 A. 372

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

There have been two trials of this case, which was brought to recover damages for injuries resulting from a fall upon a defective sidewalk, on Ogden avenue near Harrison street, in Chicago. Upon the first trial, the plaintiff recovered a judgment for \$9,000, which was reversed by the Appellate Court upon the ground that the evidence failed to show that certain of the injuries complained of were proximately caused by the accident. (Neville v. City of Chicago, 154 Ill. App. 537.) The essential facts are stated in the opinion filed in that case, and it was there stated that the evidence was sufficient to justify the jury in concluding that the defendant was negligent. Upon the second trial, the evidence as to the defendant's alleged negligence was practically the same as before, and the evidence tending to support the plaintiff's claim as to the injurious results of the accident was stronger and less conjectural in character, than in the first trial. Nevertheless, the jury found the defendant not guilty.

Upon the second trial, it was clearly shown that the sidewalk upon which the accident occurred was at that time old and worn, was affected by dry-rot and had been frequently repaired. While several witnesses called by defendant testified that they had never seen any holes in the sidewalk, all of them practically admitted that the walk was in the condition above stated. The manner in which the accident occurred was not disputed. The real dispute in the case arose upon the claim of the plaintiff that certain

ailments that developed long after the accident were directly caused by the accident. Most of the evidence on this point was given by physicians. Some of the evidence of these physicians was opinion evidence, and some was as to matters of fact. The physician who attended the plaintiff at the time of the accident testified only as to the plaintiff's injuries at that time and his treatment for a week or two thereafter. At the defendant's request, the court gave to the jury the following instruction:

"The court instructs you that you are to judge of the credibility of doctors and experts the same as of the credibility of other witnesses. You are not bound to take as absolutely true the testimony of any doctor or expert, but you are authorized to consider the apparent consistency, fairness and congruity of such testimony; the probability or improbability of the same; the motive, temper, feeling or bias of the witness, if any; his interest or lack of interest, if any, in the result of the case; and to give such credit to such testimony as, under all the circumstances, you believe it to be entitled to, and no more."

The practice of calling special attention to particular witnesses or particular testimony in instructions to the jury has been repeatedly criticized. (The People v. Campbell, 234 Ill. 391, 395; Hranek v. The People, 134 Ill. 180; Judy v. Judy, 331 Ill. 470, 477; Gurdett v. Chicago Auditorium Assn., 178 Ill. App. 133.)

In some of the cases cited, the giving of such an instruction was held not to be reversible error where there was nothing to show that it had or might have affected the result. We do not think that can be said in this case. The plaintiff was entitled to supply, if she could, the failure of proof on account of which the first judgment was reversed, and she attempted to do so by the evidence of doctors. Other instructions were given which were a sufficient guide to the jury in weighing the evidence, including that of the doctors. This being true, the special instruction as to the testimony and credibility of the doctors could hardly fail to convey the impression that in the opinion of the court, the

testimony of the doctors should be scrutinized more closely by the jury than that of other witnesses. While the first sentence of the instruction tells the jury that the credibility of such witnesses is to be judged in the same way as that of other witnesses, this statement is followed by the statement that "the jury are not bound to take as absolutely true the testimony of any doctor or expert." A jury is not bound to accept as true the testimony of any witness, if there are any facts or circumstances tending to discredit his evidence. But this principle is not peculiarly or especially applicable to the testimony of doctors. Under the peculiar circumstances of this case, we think the giving of this instruction was reversible error.

We may also add that after a careful study of the record, we are of the opinion that the verdict is clearly and manifestly contrary to the evidence. By this statement we do not mean to intimate any opinion as to whether the accident was in fact the proximate cause of the ailments from which the plaintiff was suffering years after the accident, or to intimate any opinion as to the preponderance of the evidence upon that point. But we think it is very clear from the evidence that the plaintiff was entitled to some amount for the immediate results of the accident, whether the alleged remote consequences resulted therefrom, or not.

For these reasons, the judgment of the Superior Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

301 - 10732.

RAFAEL JACKSON and MICHAEL JACKSON,
doing business as H. JACKSON & CO.,
Defendants in Error,

vs.

FRANK CROSBY LUMBER COMPANY, a Corpora-
tion,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1911 A. 375

ADDITIONAL OPINION FILED ON PETITION FOR REHEARING.

PER CURIAM: Appellant's counsel has filed a petition for rehearing which is practically a re-argument of the case. The points therein mentioned have been fully considered and our views were expressed in the opinion heretofore filed. The petition for rehearing will, therefore, be denied.

At the same time the petition for rehearing was filed, counsel filed a motion, supported by suggestions and affidavits, for a certificate of importance and appeal. In this motion, the supposed hardship of the decision in this case is set forth at great length. Such affidavits are wholly out of place, in this court, and cannot be considered for any purpose. We may say, however, that it could seem that counsel have overlooked the provisions of Section 21 of the Municipal Court Act, under which the defendant has a complete and adequate remedy, which is still available, so far as this record shows, if the facts alleged in the affidavits are true. Under that section, the Municipal Court has full power to determine every question raised in this case, upon a petition filed in that court for that purpose, even though more than thirty days have elapsed since the judgment was entered. Doubtless, also, the same relief could be obtained by a motion to re-tax costs, if any have in fact accrued. But the taxation of costs is a matter that cannot be reviewed in this court without a motion having been first made in the trial court. (Byers v. City

of Chicago, 118 Ill. App. 182; Schuh v. Reed, 207 Ill. 126.)

The motion for a certificate of importance and appeal will be denied.

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CHICAGO, ILL.

1977
301 - 19772.

EDWARD JACKSON and MICHAEL JACK-
SON, doing business as E. JACKSON
& CO.,

Defendants in Error,

vs.

GRAND CROSSING TACK COMPANY, a
Corporation,

Plaintiff in Error.

STATE OF

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 37²

375

MR. PRESIDING JUSTICE HUGH delivered the opinion of the court.

In this case, the plaintiffs, E. Jackson & Co., sued the defendant, Grand Crossing Tack Company, for thirteen dollars, alleged to be due to the plaintiffs under an assignment to them of the wages of an employe of the defendant. The Tack Company, in apt time, entered its appearance in writing, and at the same time made a written demand for a jury trial. Two days later, on motion of the plaintiffs, the suit was dismissed "without costs, it appearing to the court that no costs have accrued to either party to this cause." The Tack Company sued out this writ of error, and contends that it was error to dismiss the suit without costs.

The record filed in this court consists of certified copies of the summons, statement of claim, appearance, affidavit of merits and judgment of dismissal. No bill of exceptions, statement of facts, or stenographic report appears in the record.

The rule is well settled, that when the record and proceedings of a trial court are sought to be reviewed by writ of error, the burden is on the plaintiff in error to show that the proceedings were erroneous; that such proceedings will be presumed to be regular and free from error until error is shown by the record; and that every reasonable intendment not negatived by the record will be indulged in support of the judgment below. (See People v. Ellsworth, 301 Ill. 373, 377; Malina v. The People, 125 Ill. 306; Kelly v. City of Chicago, 148 Ill. 33, 37.)

In its order or judgment of dismissal, the trial court found that no costs had accrued to either party. This is a finding of fact, and under the rule above stated it is presumed to be correct until the contrary is shown. There being no statement of facts or stenographic report in the record, it is ^{also} presumed that the finding was based upon evidence sufficient to sustain it.

The transcript of the record does not show whether any costs were or were not paid by the defendant. It is urged, however, that because the statute requires the sum of six dollars to be paid to the clerk whenever either party demands a jury trial, it must be presumed that the clerk performed his duty and collected six dollars from the defendant in this case. No doubt such a presumption would arise in the absence of any showing to the contrary. But where the record shows a finding by the court to the contrary, the presumption in favor of the finding prevails.

If the defendant desired to question the finding of the court, it should have preserved the evidence upon which such finding was based, in the manner prescribed by the Municipal Court Act. Not having done so, it is not in a position to question such finding in this court.

The judgment of the Municipal Court will be affirmed.

ATTORNEY.

19916
111 - 19916.

H. L. HOLLISTER,
Appellant,

vs.

SAMUEL DINSMORE,
Appellee.

)
) APPEAL FROM

)
) SUPERIOR COURT

)
) COOK COUNTY.

191 I.A. 377

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

This is an appeal from a judgment of the Superior Court of Cook County upon a directed verdict for the defendant. The declaration consists of one count in trespass on the case, and two counts in trover. The trial court held "that the evidence introduced on the behalf of the plaintiff did not tend to sustain an action other than in assumpsit," and for that reason instructed the jury to find the defendant not guilty.

The evidence introduced by the plaintiff tends to prove that on November 12, 1906, the defendant, Dinsmore, executed and delivered to the plaintiff, Hollister, his note for \$5,000, due six months after the date thereof, with interest at seven per cent. per annum, and that he deposited with Hollister as collateral security, a certificate for \$25,000 worth (par value) of the stock of an irrigation company; that the note was not paid and Hollister retained possession of the collateral until December 3, 1909, when Dinsmore called at Hollister's office in Chicago and requested permission to take the collateral, sell it and bring back the proceeds, saying that he had a chance to sell all his stock in the irrigation company, including that in Hollister's hands, but that the purchasers wanted all of it or none; that thereupon the amount then due to Hollister was computed, a demand note for that amount was made out and signed by Dinsmore, and the collateral was delivered to him for the purpose and upon the understanding above stated; that Dinsmore sold the stock but failed to account for the



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proceeds.

Taking this evidence to be true - as it must be taken, on a motion to direct a verdict - it is clear that the delivery of the stock by Hollister to Dinwore was not an unconditional delivery of the same, but that Dinwore received and held it merely as the agent of Hollister for the special and limited purpose of selling the same for Hollister's benefit. The lien of Hollister was not thereby lost, and the failure or refusal of Dinwore to return either the stock or the proceeds, constituted a conversion. (Pica & Bullen Malting Co. v. Bank, 185 Ill. 428; Colburn v. Commercial Security Co., 172 Ill. App. 510; Kellogg v. Thompson, 142 Mass. 78; Ways v. Riddle, 1 Sandf. N. Y. 348; Cooper v. Ray, 47 Ill. 53; Palmtag v. Contriek, 39 Cal. 184.) It is permissible to join counts in trover and in case in the same declaration.

(Mutual Life Ins. Co. v. Allen, 212 Ill. 134.)

It follows that the trial court erred in holding that no recovery could be had except in assumpsit. No question seems to have been raised as to the measure of damages, and we have not, therefore, referred to the evidence upon that point. In Ways v. Riddle, supra, it was held that the measure of damages in such a case is the value of the collateral with interest from the time of the conversion, unless such amount exceeds the sum due the pledgee. Such value is, of course, material in a tort action.

The judgment of the Superior Court will be reversed and the cause remanded.

REVEREND AND REMANDED.

19981

573 - 19981.

H. STUART ADAM, Administrator of
the Estate of GEORGE J. ADAM, De-
ceased,

Appellee,

vs.

COLUMBIAN NATIONAL LIFE INSURANCE
COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

1911 A. 378

MR. PRESIDING JUDGE FIFTH delivered the opinion of the court.

This was a suit upon a life insurance policy for \$8,000, issued by appellant in 1907, insuring the life of George J. Adam, who died November 3, 1913. Upon the trial, appellee introduced in evidence the policy, receipts for all the annual premiums accruing during the lifetime of the deceased, proof of the death of the insured, the appointment of an administrator, and the delivery of proofs of death to the insurance company.

Appellant then offered to prove that the last annual premium, due on December 3, 1911, was never in fact paid; that instead of paying that premium, the insured gave his promissory note for the amount thereof, due six months thereafter, and then extended two months further, which note contained a recital to the effect that it was given "with the full knowledge and intent," on the part of the insured, that if the note was not paid when due, "said policy shall become absolutely null and void, subject to the legal conditions contained therein relating to cash value, paid up and extended insurance," without further notice: and that said note was never paid. Appellant offered to prove further, by oral testimony, that at the time such note was given, it was fully explained to the insured that a failure to pay the note at maturity "would absolutely void his policy." Appellee objected to all this offered evidence, and the objections were sustained by the trial court: to which ruling exceptions were duly preserved. No other defense being made, the court thereupon instructed the jury to find a

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verdict for appellee for the full amount of the policy and interest. ^{and} The Insurance Company appeals.

The policy provides that "The consideration for which this policy is issued, is the payment of One Hundred and Sixty-three dollars on the sixth day of December in each and every year during the continuance of this policy, the balance, if any, of the then current year's premium to be deducted in any settlement thereof;" that "premiums are due and payable at the home office of the company in the city of Boston, but may be paid to the authorized agents of the company in exchange for the company's receipt therefor signed by the President or Secretary and countersigned by the agent;" and that "failure to pay any premium when due will void this policy and forfeit all premiums to the Company, except as herein provided." The exceptions thus referred to give the insured thirty ^{days} grace for the payment of premiums after the first year, make the policy "automatically paid-up" for certain specified amounts in case of default in the payment of any premium after the third, and give to the policy certain specified surrender values under certain circumstances. There is no other provision in the policy regarding the payment of premiums.

Appellant contends that a receipt purporting to acknowledge the payment of any insurance premium except the first, is, like other receipts for the payment of money, merely presumptive evidence of payment, which may be contradicted or explained by proof of other relevant facts or circumstances; that no such receipt (other than an acknowledgment in the policy itself of the payment of the first premium) is contractual in its nature and that therefore the court erred in refusing to admit the evidence offered by appellant. To this contention, appellee replies that the rule is well established in this State that if an insurance company gives an unconditional receipt for any premium, whether it be for the first or for any other premium, the company is estopped, on grounds of public policy, from

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contradicting its own receipt for the purpose of avoiding the policy or claiming a forfeiture thereof.

The only Illinois cases cited by appellee in support of his theory, are cases wherein it was held that insurance companies are concluded, on grounds of public policy, by a recital in the policy to the effect that the first premium has been paid, and will not be heard to assert the contrary for the purpose of avoiding the contract of insurance, if the policy has been actually delivered. The cases of The Teutonia Ins. Co. v. Anderson, 77 Ill. 334; Illinois Central Ins. Co. v. Self, 37 Ill. 358; and Provident Life Ins. Co. v. Fennell, 40 Ill. 100, cited by appellee, are cases of that character. It may be doubted whether the reasons given in the opinions filed in those cases have any application to cases like the present case where the acknowledgment of payment is not in the policy itself and is not for a first premium. An acknowledgment in an insurance policy that the first premium has been paid, followed by an actual delivery of the policy, amounts to an assertion by the company itself that the policy is in full force and effect as a contract of insurance, which the company is thereafter estopped to deny. To permit such an acknowledgment in the contract itself to be contradicted by oral testimony would be a palpable violation of the rule that excludes parol evidence, tending to vary the terms of a written contract. The same reasoning applies to cases where the receipt is given for the purpose of renewing a term insurance contract for a stipulated further term, as in the case of Union Life Insurance Co. v. Wign, 87 Ill. App. 257. But where the contract of insurance is already in force and is a continuing contract requiring periodical payments to be made to keep it alive and prevent forfeiture, and the receipt is given merely for the purpose of acknowledging the payment of one of the subsequent premiums as required by the terms of the contract, no new contract is thereby created, and there is therefore

nothing in such cases to prevent the application of the ordinary rule permitting receipts to be explained or contradicted by parol evidence. In Mutual Life Ins. Co. v. Amerman, 110 Ill. 2d, it was said with reference to the legal effect of a receipt given for a second premium (p.339): "No new contract of insurance was made or intended to be made. The only office of the receipt was to acknowledge the payment of the premium as required by the terms of the policy, and avoid the effect of the condition forfeiting the insurance for non-payment of the premium." The principle of estoppel might apply in such cases, if the rights of third persons who acted upon the faith of the company's receipt, were involved: but that principle can ordinarily have no application inter partes.

Apart from these considerations, however, the argument of appellee's counsel assumes that the receipt that was given for the premium due December 3, 1911, was, by its express terms, an acknowledgment of an unconditional payment of the fifth annual premium. We think this assumption is not warranted by the evidence. Appellee offered in evidence five receipts. The first reads as follows: "Received the annual premium due Dec. 3, '07, as per statement in the margin hereof, on policy No." etc.; and in the margin is the following: "Premium for one year, \$128.00." The next three are in the same form and each is marked with the "date when paid." The fifth "receipt", being the one in question, is entirely different from the others. While it is labeled a "premium receipt" across the margin, the words of such receipt are as follows: "The premium due as set forth below has been settled this day." Beneath this statement the policy number, the "due date," and the amount of the premium, are given. It thus appears that while each of the first four receipts acknowledges, in terms, that an annual premium of \$128 has been "paid" to the company, the fifth merely states that the premium due December 3, 1911, has been "settled." The word "settle" has a

double meaning and is used alike to denote an adjustment of a demand and a payment (Auzerais v. Haglee, 74 Cal. 40, 47). It is synonymous with either "adjust" or "pay" (People v. Green, 5 Daly. 154, 201). The word "settle" does not necessarily convey the meaning of "payment" (Port v. Goding, 2 Barb. 371, 377; Tombs v. Stockwell, 181 Mich. 433; Bell v. Crawford, 8 Cratt. 110, 113). The presumption, therefore naturally arising from the introduction of the first four receipts was that the first four premiums were actually paid in cash, while the presumption naturally arising from the introduction of the fifth receipt was that the fifth premium was not paid in cash, but was otherwise settled or adjusted. The record shows that after this "receipt" had been offered in evidence, appellee also introduced a copy of a letter written by appellee's attorney to the company, stating that a note was given "in payment" of the premium due on December 3, 1911, and authorizing the company to deduct the amount due on that note from the amount claimed to be due under the policy. It therefore appeared, from appellee's own evidence, that the last receipt was not given to evidence a cash payment, but was given in exchange for a note of the insured. The execution of the "receipt" and of the note were thus shown by the plaintiff's own evidence, to be both parts of one and the same transaction. We think it is clear that under such circumstances, appellant had the right to show the whole transaction. The note was certainly competent for that purpose and also for the purpose of showing the sense in which the word "settle" was used in the last receipt.

We think there is no merit in the point made as to the alleged departure in pleading, in the absence of any demurrer on that ground.

The contention of appellee that appellant was required to show affirmatively that it had elected to declare a forfeiture upon the non-payment of the note is untenable (Schime v. Cedar Rapids Ins. Co., 124 Ill. 374; Rose v. Mutual Life Ins. Co., 240 Ill. 48, 84). Nor do we think the mere fact that the note was not cancelled and returned, can be held to be a waiver of the forfeiture, if ^{any} unaccompanied by ~~xx~~other fact or circumstance tending to prove that the company retained it for the purpose of collecting it as an independent obligation.

What we have said requires us to reverse the judgment and remand the case for another trial. We deem it proper to add, however, that we do not mean to be understood as expressing any opinion as to what effect, if any, should be given to that clause of the note in question which makes a forfeiture of the policy for non-payment of the note "subject to the legal conditions" of the policy "relating to cash value, paid-up and extended insurance." The record shows that appellant offered to pay appellee the amount of a paid-up policy, 1903, and to that extent admitted its liability; but whether that is the full measure of its liability, in view of the clause in the note above quoted and the provisions of the policy relating to extended insurance, is a question that has not been discussed in the briefs of counsel, and that we do not decide.

REVERSED AND REMANDED.

174 - 13,281.

S. STUART ADAM, Administrator of the
Estate of GEORGE J. ADAM, Deceased,
Appellee,

vs.

COLOMBIAN NATIONAL LIFE INSURANCE COM-
PANY.

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

191 I.A. 378

ADDITIONAL OPINION FILED ON PETITION FOR REHEARING.

PER CURIAM: In saying that a presumption arises from the introduction of the fifth receipt that the fifth premium "was not paid in cash, but was otherwise settled or adjusted," we do not mean to convey the impression that such receipt alone would raise that presumption, but that when all the receipts are considered together, such a presumption naturally arises. The petition for rehearing will be denied.

253

OTTILLIA DAWSON,
Defendant in Error,

vs.

DR. A. BROM ALLEN,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1911 A. 399

MR. PRESIDING JUDGE FITCH delivered the opinion of the court.

In this case, the plaintiff, Ottillia Dawson, a school teacher, recovered a judgment for \$200 damages for an injury sustained by her through the alleged carelessness of the defendant, A. Brom Allen, a dentist, while he was engaged in extracting one of her teeth. Before pulling the tooth, the plaintiff was anaesthetized by the inhalation of nitrous oxide gas administered by a trained nurse in defendant's office. The whole time during which the plaintiff was in the dentist's chair did not exceed five minutes, and the period of complete unconsciousness (during which the tooth was extracted) did not exceed forty seconds. The plaintiff does not claim there was anything wrong with the operation itself or the administration of the anaesthetic. Her claim is that her foot was injured at that time. She testified that before the operation her foot was in perfect condition; that immediately after the operation, she felt a sharp pain in her left foot, and cried out: "Oh, my foot;" that defendant said: "Your foot is all right: get up and walk:" that she walked into an adjoining room, where she rested a few minutes on a couch, and then left the doctor's office, suffering great pain. This happened about noon time. She went about her usual duties during the afternoon, but the pain in her foot continued. On arriving at her home after school was over, she removed her shoe and discovered a bruise on the instep, about in line with the buttons of the shoe, and about the size of a silver dollar. A doctor was called, who pre-

described hot applications and bandages. She claims she was unable to perform her usual work for a period of six weeks, and expended \$27 for doctor's bills and medicine. The defendant and his assistant both testified that nothing happened while the plaintiff was in the chair that could have caused the injury described by her.

It appears from the evidence introduced by both parties that the administration of gas affects some persons in one way, and others in a different way; that some remain quiet, while others become more or less violent; that there is no certain way of ascertaining in advance just how a particular patient will act while under the influence of the anæsthetic; that it is not customary, nor advisable under ordinary circumstances, to strap the patient in the chair, but that the patient is carefully watched, and restrained with the hands, if necessary, to the extent that may seem practicable under all the circumstances.

In the argument to the jury, plaintiff's counsel said:

"We do not, I contend, have to go further than to show that this accident happened at that place. It happened in her helpless condition. It was something that would not ordinarily happen in a dentist's chair, and that is all we have to show; it is all we can show, it is all you or anybody else can show under the same circumstances." This statement was objected to by defendant's counsel, but the objection was overruled. In the oral instructions given to the jury, the court said, in part: "The jury are instructed that if they believe from the evidence that plaintiff was hurt without fault on her part, while she was under the care and control of defendant, and her injury was of such a nature as would not happen in the ordinary course of things, under such circumstances, then the jury have a right to presume that the injury was caused by defendant's negligence, and that the burden is upon the defendant

to overcome that presumption." This portion of the charge was specifically objected to and the objection overruled.

In the briefs of plaintiff's counsel it is said: "As to how this injury was received, no satisfactory information was given by anyone. * * * Plaintiff makes no conjecture as to the manner in which she received this injury. There is no evidence from which to deduce any theory of what actually caused this injury!"

It is argued, however, that the doctrine of res ipse loquitur applies, and several cases are cited in which that doctrine was discussed. In one of them, viz., the case of Barnes v. Danville Street Ry. Co., 339 Ill. 334, an instruction was given which, in effect, told the jury that the mere happening of an accident to a street car in which the plaintiff was riding with due care as a passenger raises the presumption that the carrier was negligent and that the burden of rebutting such presumption rests upon the carrier. As to this instruction, the court said (p.373): "A carrier of passengers is not an insurer of their safety, and therefore liability does not arise from the mere happening of an accident. * * * If an injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, or by some defect in machinery, cars or track, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the plaintiff and raises a presumption of negligence. The presumption arises, however, from the nature of the accident and the circumstances and not from the mere fact of the accident itself." In O'Callaghan v. Bellwood Park Co., 344 Ill. 336, 345, the rule in such cases is stated as follows: "If the injury of a passenger is caused by apparatus wholly under the control of a carrier and furnished and managed by it, and the accident is of such a character that it would not ordinarily occur if due care is used, the law raises a presumption of negligence."

Ordinarily, physicians and surgeons are responsible only for a failure to exercise such reasonable care and skill as those in good practice ordinarily use. (Quinn v. Donovan, 85 Ill. 174; McNevena v. Lowe, 40 Ill. 203). Assuming, however, that in a case like the present one, due care on a dentist's part requires him to use the highest degree of care and skill to prevent injury to a patient in his care while such patient is under the influence of an anaesthetic, it is not contended - nor do we think it could be successfully maintained - that a dentist is, even under such circumstances, an insurer against all possible injuries or accidents. Yet such, in effect, is the only meaning that can fairly be given to the instruction above quoted. It states, in effect, that a presumption of negligence arises from proof of the mere fact that the plaintiff, without her fault, sustained an injury of an unusual character, while she was in the care and control of the defendant. Such a rule would make a dentist presumptively liable for every possible injury or accident of an unusual nature that might happen to a patient while in his care and control, even though it could not be prevented by the exercise of the highest degree of care and skill on his part. Such is not the law. Even in passenger and carrier cases, where the doctrine of res ipsa loquitur is most frequently invoked, it has never been held that liability attaches merely upon proof that an injury "of such a nature as would not happen in the ordinary course of things," was sustained by a plaintiff, without her fault, "while she was under the care and control of the defendant." The determining factor that gives rise to a presumption of negligence in such cases is not that the injury is one that "would not happen in the ordinary course of things." Before such a presumption can be indulged, it must be shown that the injury is of such a character that it would not ordinarily occur if due care is used. The italicized qualifica-

tion is wholly omitted from the instruction as given.

Furthermore, the doctrine of res ipsa loquitur can only be properly invoked where there is some evidence tending to prove that the injury complained of was caused by something under the defendant's control (Hart v. Washington Park Club, 157 Ill. 2). Since it is admitted that "there is no evidence from which to deduce any theory of what actually caused this injury," it was not the province of the court to assure by its instructions that the injury was caused by something under the defendant's control. For aught that appears, it might have been caused by pure accident, or by something not at all within the control of defendant. The cause of the injury was a question of fact and one of the main issues in the case.

In our opinion, the giving of this instruction and the overruling of the objection to the remarks of the plaintiff's attorney voicing the same theory, were prejudicial errors which require us to reverse the judgment and remand the cause for a new trial, and such will be the order.

REVERSED AND REMANDED.

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JAMES TODD,
Defendant in Error,

vs.

S. HARNSTROM,
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 209

MR. JUSTICE PAM delivered the opinion of the court,

This is a suit brought in the Municipal Court of Chicago by James Todd, defendant in error and hereinafter referred to as the plaintiff, against S. Harnstrom, plaintiff in error and hereinafter referred to as the defendant, for a balance due on account of extra mason work, excavating and material furnished for a building constructed for defendant at the northeast corner of Berwyn and Kenmore avenues, Chicago, Illinois. The case was tried in the court below without a jury. The court found the issues in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages in the sum of \$394.70, upon which finding the court entered judgment, - to reverse which the defendant has sued out this writ of error.

Plaintiff's statement of claim set out in detail the extra mason work, excavating and material furnished for and at the request of the defendant, for the building being constructed at theforesaid location; and it further stated that the value of the said extra mason work, excavating and material was figured on the basis of prices agreed upon in the original contract, save as to a special agreement in regard to certain brick, with reference to which plaintiff claims that in order to secure an early completion of the building, it was necessary to pay for 222,000 brick \$7 per thousand instead of \$5, and that defendant agreed with plaintiff to pay one-half of said advance. It set forth in detail the credits by cash payments, and also the credits by reason of allowances to the plaintiff in the use of a cheaper grade

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CHICAGO, ILLINOIS 60637
U.S.A.

of brick for face and mantel work than had been provided for in the contract, the change in the character of the brick being made under an agreement between the plaintiff and the defendant; that after allowing all credits there was due plaintiff from defendant, because of the extra mason work, excavating and material, the sum of \$408.70. Plaintiff further set forth in his statement of claim, that he had offered to submit his claim to one L. Ostling, mutually selected as arbitrator, but that the said Ostling neglected and refused to comply with the request of the plaintiff for arbitration of the amount due plaintiff for said extra work and material.

To this statement of claim, defendant filed an affidavit of merits wherein he set forth that the contract provided the manner in which alterations, additions or extra work should be appraised; that following the manner so provided, the valuation placed on said extra work was \$350; further, "that an accounting was had between the plaintiff and defendant herein on or about October 31, 1910; that the value of all alterations, additions and extras was fixed and agreed upon at the sum of \$350.00; that on said date all payments and all items and matters in dispute between the parties hereto and all allowances were checked over and agreed upon, and that on said date it was found and agreed that the sum of \$250.50 was the sum then due and owing to plaintiff which said sum was on said date paid to said plaintiff." (Italics ours.) The affidavit of merits then concluded with the statement that defendant had paid all claims under the said contract and for extras mentioned, and that there was nothing due plaintiff. Upon the statement of claim and affidavit of merits hereinabove substantially set forth, the case proceeded to trial.

James Todd, plaintiff, testified that while at work on the excavating, it was found necessary to go down deeper in order to secure a firm foundation. This required extra excavation and mason work not provided for in the plans and specifications which formed

The first of these is the fact that the law of the land is not a static thing, but a living organism, which grows and changes with the needs of the people. It is the duty of the legislature to keep the law in harmony with the needs of the people, and to make such changes as may be necessary to meet those needs. This is the duty of the legislature, and it is the duty of the people to support the legislature in the discharge of this duty. The second of these is the fact that the law of the land is not a perfect thing, but an imperfect thing, which is subject to error and to change. It is the duty of the legislature to make such changes as may be necessary to correct errors and to improve the law. This is the duty of the legislature, and it is the duty of the people to support the legislature in the discharge of this duty. The third of these is the fact that the law of the land is not a thing which can be made perfect by the legislature alone, but a thing which can only be made perfect by the cooperation of the legislature and the people. It is the duty of the legislature to make such changes as may be necessary to improve the law, and it is the duty of the people to support the legislature in the discharge of this duty. This is the duty of the legislature and the people, and it is the duty of the people to support the legislature in the discharge of this duty.

a part of the original contract. He testified further that the defendant directly requested him to do this extra excavating and extra mason work; that, acting under said agreement, there was furnished 1780 cubic feet of extra masonry work, and 184 cubic yards of excavating, the value of which, based on the price arranged for similar work under the original contract, amounted to \$438.70 and \$82, respectively. He testified further, that defendant had originally contracted for brick to be used on this building from the Carey Brick Company, at \$5 per thousand, but that severe weather and snow prevented that company from making regular and rapid deliveries, and that he stated this fact to the defendant; and further, that the Illinois Brick Company which was charging \$7 per thousand, was in position to make prompt deliveries, and that if he (defendant) would bear one-half of the difference in price, he (plaintiff) would stand the other one-half; and that defendant thereupon authorized him to go ahead upon that basis; that under that arrangement he secured 822,000 brick from the Illinois Brick Company; that by reason of this agreement, there was due plaintiff \$111 for the brick purchased from the Illinois Brick Company. In these facts he was corroborated by the testimony of Adam B. Todd, his son, who was working on the job with his father. Plaintiff further testified that the amount of this extra work and material furnished aggregated \$346.70, which added to the amount of the original contract (\$12,900) made the defendant indebted to the plaintiff in the sum of \$13,546.70 for all the work performed and material furnished. Plaintiff then further testified as to the amounts paid in cash and the credits allowed as set forth in plaintiff's statement of claim, and that after deducting said amounts paid in cash and the credits allowed, there was due from the defendant the sum of \$408.70.

Defendant, in his affidavit of merits, set forth that the contract provided the manner in which alterations and additions

should be appraised, viz., that the party of the second part (defendant) may make alterations by adding, omitting or deviating from the plans, drawings or specifications, and that in such case the owner (defendant) shall have the right to appraise such alterations, additions or deviations, and to add to or deduct from the original amount accordingly, and that this provision should in no way impair the validity of the contract; but that in case a dispute arose with respect to the true value of the work added, the same was to be arbitrated by applying to L. Ostling. By referring to this clause in the agreement, in his affidavit of merits, defendant recognized that extra work had been performed and extra material furnished him by the plaintiff. While ~~xxxxxxxxxxxx~~ the plaintiff argues ~~xxxxxxxxxxxx~~ the validity of any such agreement to control the rights of the plaintiff in this case, that question does not arise, by reason of the further defense set forth in the affidavit of merits, viz., that the amount fixed by the owner (defendant) as the value of the additional work and material furnished him by the plaintiff was agreed to by the plaintiff, and that after allowing certain deductions from the claim of the plaintiff, by reason of additional credits claimed by defendant, an amount in settlement of all items and matters in dispute was agreed upon on October 31, 1910, in the sum of \$250.00; and that said sum was paid to the plaintiff by the defendant.

This affidavit of merits clearly presents but one defense to the claim of the plaintiff, and that is, that the parties had arrived at an agreement of all items and matters in dispute, and that such agreement constituted an account stated, and that the amount arrived at (\$250.00) having been paid, the agreement constituting this account stated had been fulfilled, and that there was nothing further due plaintiff from the defendant. This affidavit of merits did not deny that the extra work and material had been furnished, nor the value thereof; it simply relied upon the defense

It is the duty of the court to determine whether the plaintiff has established his right to the property in dispute. In this case, the plaintiff has shown that he is the owner of the property in dispute. He has produced the title deed and other documents which prove his ownership. The defendant has failed to show that he has any right to the property. Therefore, the court finds in favor of the plaintiff and awards him the property.

The plaintiff

is entitled to the property in dispute.

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of account stated. This defense is clearly an affirmative one, upon which defendant had the burden of proof.

Upon the issues presented by the affidavit of merits, defendant testified that he had informed plaintiff that the value of the extra work and material furnished was \$350. There was, however, no explanation as to how this figure was arrived at. It may, however, be taken as an admission that extra material and work were furnished by the plaintiff to the defendant. Defendant further testified that the credits to be allowed by reason of the different quality of mantle and face brick used should have been \$237.50 (which was \$31.50 more than plaintiff had allowed on that item); that in addition to this, he mentioned to plaintiff three items aggregating \$40.50, for certain work done by him (defendant) which should have been performed by the plaintiff under the original contract; and an additional allowance on brick, of \$10.50, claimed by him: that plaintiff had acquiesced in such credits and that an accounting on this basis showed there was due from defendant to the plaintiff the sum of \$250.50; that this accounting was had on October 31st, and that he then handed plaintiff a check for that sum; and further, that in the presence of the plaintiff on that day he made the following memorandum on the back of the original contract (defendant's exhibit 5): "Ok. Oct. 31st, 1910 in full and extras, \$250.50." Defendant also offered in evidence certain documents which contained figures which he claimed to be evidence of the accounting arrived at between the plaintiff and the defendant. Defendant furthermore denied on the witness stand that any conversation had taken place with reference to extra work and material, authorizing an advance in the price of brick from \$4 to \$7, as testified by the plaintiff. This, however, was not made an issue by the affidavit of merits, which was expressly limited to the defense of an account stated. This is further evident from the open-

The following is a list of the names of the persons who have been elected to the office of the President of the United States.

1. George Washington

2. John Adams

3. Thomas Jefferson

4. James Madison

5. James Monroe

6. John Quincy Adams

7. Andrew Jackson

8. Martin Van Buren

9. William Henry Harrison

10. John Tyler

11. Zachary Taylor

12. Franklin Pierce

13. James Buchanan

14. Abraham Lincoln

15. Andrew Johnson

16. Ulysses S. Grant

17. Rutherford B. Hayes

18. James A. Garfield

19. Chester A. Arthur

20. Grover Cleveland

21. Benjamin Harrison

22. William McKinley

23. Theodore Roosevelt

24. Woodrow Wilson

25. Warren G. Harding

26. Calvin Coolidge

27. Herbert Hoover

28. Franklin D. Roosevelt

ing statement of counsel for the defendant at the conclusion of the plaintiff's case, wherein he stated:

"Mr. Skinner:

If the Court please, I wish to make a little statement in this matter, that we propose to show that Mr. Harnstrom and Mr. Todd, after this building was completed came together and had an accounting, and that the amount of the extras and the additional work, material and everything, was figured up and agreed upon, that all payments made by Harnstrom to Todd were check^{ed} up with the amount of the contract price of \$18,900, I believe, that the amount that was allowed and agreed on for extras, which was \$350 was added together and from that was deducted the amounts of the payments that Harnstrom had made to Todd, and the amounts of the allowances as Mr. Todd testified, for brick that were purchased for less than the price in the specifications and for which he admits Mr. Harnstrom was to have credit, and that after all those allowances were taken into consideration, and the amounts of the payments footed up, that the amount was subtracted from the total of the contract price, and the price agreed upon for extras, and that the balance was then and there determined, and a check was given in full of that amount that was there determined, that was in settlement of the entire claim of Mr. Todd, and I think Your Honor will see that the matter was a matter in dispute and that the parties came together and had their accounting --

Mr. Meek (for plaintiff):

That is, in effect to plead an account stated.

Mr. Skinner:

"We have set up those matters in the affidavit of merits."

There can be no question that under the affidavit of merits and statement of counsel as to his defense, that the defendant relied entirely upon the defense of account stated.

Upon this issue plaintiff took the stand and denied categorically the testimony of the defendant with reference to having entered into any agreement whereby all payments, ~~all~~ items and matters in dispute were checked over and agreed on, and that there was found due and owing plaintiff the sum of \$240.00. He, moreover, denied that there ever was brought to his attention any memorandum to the extent of \$60.50 as testified to by the defendant, or that he allowed a credit to defendant for that sum. He, moreover, denied that the difference in favor of the defendant by reason of the change in the quality of face and mantle brick was \$337.50, or that there was a further allowance on brick of \$19.00; he furthermore

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

denied that defendant in his presence called his attention to the fact that he (defendant) had made a memorandum that that check for \$200.50 was a settlement in full. Moreover, the exhibits with reference to these items of \$20.50, \$19.50 and \$337.50 are all in the handwriting of defendant or his representative, and nowhere do any of these exhibits bear any writing or memorandum made by the plaintiff or his representative, save exhibit 8, which is the contract itself. From a careful examination of the indorsements appearing on that exhibit, we believe the trial court may have been influenced in favor of the plaintiff by the place wherein the items of \$337.50 and \$39.50 appear, and the manner in which they appear to have been indorsed on said exhibit.

There being no denial of plaintiff's claim either in the affidavit of verita or opening statement for the defendant; there being an express admission that there was extra labor performed and extra material furnished, and the plaintiff having offered testimony tending to prove his claim as set out in his statement of claim, the only question in the case was whether or not there had been an accounting agreed on which constituted an account stated. This was clearly a question of fact upon which defendant had the burden of proof. The court heard the testimony and saw the witnesses: by his finding he evidently was of the opinion that the defendant had not sustained his defense of account stated, and, moreover, that the plaintiff had proven his right to recover for the extra work performed and the extra material furnished, as set forth in his statement of claim. The court, however, reduced the amount of plaintiff's claim to the extent of \$34, because the bills of the Illinois Brick Company offered in evidence showed only 218,000 brick delivered instead of 222,000. While defendant raised the point that the bills were not competent evidence to show the amount of brick delivered, yet there was oral testimony that 222,000 brick were delivered. The court, however, gave the plaintiff the benefit of only the amount shown by the bills of the Illinois Brick Company.

From a careful review of the evidence in this case, we believe that the finding of the issues in favor of the plaintiff and assessing his damages at \$384.70 was not only not clearly and manifestly against the weight of the evidence, but that the court was fully warranted in arriving at such conclusion.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

111 - 18,324.

MARY MURPHY,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

CIRCUIT COURT

CHICAGO, ILL.

191 I.A. 431

STATEMENT OF THE CASE. This is an action brought by Mary Murphy, appellee and hereinafter referred to as the plaintiff, against the Chicago City Railway Company, appellant and hereinafter referred to as the defendant, to recover damages for injuries sustained in a collision between two of defendant's street cars, on one of which plaintiff was riding as a passenger. The accident occurred at the intersection of Center Avenue and 47th Street at eleven o'clock at night, and was caused by a switch being left open, which caused the westbound car coming from the east to collide with the eastbound car going over the crossing at Center Avenue and 47th Street.

Plaintiff, in company with two friends, - Thomas Murphy and Mary Grant - became a passenger on the car at Ashland Avenue. At the time of the accident plaintiff was seated at the rear of the car on the long seat on the north side, close to the last cross seat. There were two crosses of the cars; at the first one plaintiff jumped up, and at the second she was thrown back onto the seat of the car. Thomas Murphy, who was standing near the plaintiff, was hanging onto a strap, and when the accident occurred, the strap to which he was hanging broke, and Murphy was thrown to the ground but immediately got up. He sustained no injury.

Murphy testified that with the assistance of another, he carried plaintiff off the car and into a saloon at the corner and put her in a chair; that she was unconscious. On cross-examination he stated that she did not speak coherently - did

not seem to realize where she was, which condition he considered one of unconsciousness. He stated that she appeared nervous and hysterical; that she was removed by an ambulance of the city police department to the Inglewood hospital.

The conductor of the southbound car testified that he did not see anyone carried from the car; that his attention was first attracted to the plaintiff by hearing someone crying; that he then saw plaintiff standing about a half car-length away from the car, surrounded by a number of people; that she was in a hysterical condition; that he and someone else assisted her to walk to a neighboring saloon, where he placed her in a chair and brought her a glass of water; that three or four others also claimed to have received minor injuries.

The ambulance driver stated that when he arrived he found plaintiff in a chair and hysterical, but could not say whether she was unconscious.

Thomas Murphy testified that he accompanied plaintiff to the hospital, and that while he was there, she was attended by a nurse or interne; that she lay there "quite still," and he could not tell whether she was dead or asleep; that he furthermore thought she was unconscious, because she would not speak to the nurse or to him.

Dr. Mason, head surgeon of the hospital, testified that he attended her the morning after the accident; that he talked with her and obtained from her a statement as to her pains; that she said she had pains in the shoulder, head, and in the region of the small of the back; that upon a physical examination he found no contusions, abrasions or any external marks of physical violence; that plaintiff did not complain of any pains in the abdomen or in the pelvic region; that he made no pelvic or vaginal examination; that her pulse and temperature were practically normal; that his prognosis, from what he had observed on

this examination, was that she would be well in a few days; that he prescribed hot applications and placed a stiff bandage on her shoulder and back.

On January 25, 1910 - the second day after the accident - Dr. Wm. C. Krohn, a physician and surgeon, visited plaintiff at the hospital and examined her at the request of the defendant; he did not attend or prescribe for her, and no one representing plaintiff was there at the time. Dr. Krohn testified that he found her temperature and respiration normal; that his attention was called by plaintiff to the condition of her shoulder and back; that a physical examination did not reveal any swelling, contusion or laceration; in fact, there was no evidence of any physical violence; that in testing the reflexes he found the reaction normal; that he did not make a vaginal examination; that he noticed the breath of plaintiff was quite fetid, and her tongue heavily coated; that he palpated the abdomen and found that she was suffering from constipation; that while examining her abdomen by palpating and pressing in the abdominal wall three or four inches, he noticed no pain or tenderness in the pelvis, - in fact, that there was no complaint of pain except on one occasion, when she complained of pains in the back; that she was of a distinctly anemic type; that her "pallor and lack of rich blood" in her veins showed the anemic type; that she was an "overworked, overtaxed girl; that she was poorly nourished, poor muscular type, of poor skin appearance, an anemic type of girl."

At the end of three days plaintiff left the hospital and went to the home of her friend, Mrs. Gallagher, where, on January 26th she was examined by the family physician of Mrs. Gallagher, Dr. Benedict F. Shanahan, who testified that he made a thorough external body examination, also a pelvic and vaginal examination; that plaintiff was emaciated and sickly looking; that he found a contusion on the left side of the head, covering an area of

about two inches, swelling on the right shoulder and in the lumbar region of the back, and marked tenderness in that region; that the pelvic and internal examination also showed a marked tenderness throughout the pelvis; that he prescribed liniment and massage; that the plaintiff complained of tenderness, pain in the back, head and shoulder, and general pain all over the body; that for one week he treated her every day, and the following week every other day; that after that she came to his office; and that about six weeks or two months after the accident he again made a vaginal examination and found plaintiff suffering from a retroflexion of the uterus; that he treated her from time to time, made an additional vaginal examination, and finally in April performed an operation at the Francis Willard hospital, at which time he corrected the condition of the uterus and placed it in its normal position; that at the same time he found her appendix in an unhealthy state and removed it. (There is no claim in this case, however, because of the condition and removal of the appendix;) that she remained in the hospital two weeks and one day; that he advised her to remain longer, but she left; that he also advised her against doing work, and that she came back to him at frequent intervals after the operation - occasionally two or three times in succession and then again not for months - and he found her continually sickly looking and emaciated; that a vaginal examination made afterwards showed that the uterus was in a normal position; that she always complained of pains in the back and sides, and of headaches; that at the time of the trial she was in a weakened state and her general physical condition was not good; that she would get better and make a fair recovery within a number of years.

Plaintiff testified that she was born in Ireland and came to this country at the age of fifteen years; that she left school when eleven years of age, and helped around the house from the time she left school until she came to America; that upon

her arrival here she went to Philadelphia, where she remained with an uncle for two weeks; that she then took employment as a nurse, taking care of a baby; and that during the second year she did housework, which she continued doing constantly in various homes in Philadelphia, much of that work being in large houses; that from Philadelphia she came to Chicago, arriving here in September, and began working for a family with whom she was employed at the time of the accident; that while there she did general second housework; that she occasionally had headaches before the accident and wore glasses, and had worn them since she was about fifteen years of age. She then stated the facts about carrying a passenger on an eastbound 47th street car, and where she was seated when the collision occurred. She testified further, that at the time of the collision there were two crashes; that at the first crash she jumped up, and that after the second crash she was thrown on her back and her head struck the window of the car; and that the next thing she remembered was that there were a lot of people standing around in a place which she was told was a saloon; that she was given a drink of water, and did not recollect anything further until she found herself in the Englewood hospital the next morning; that she was all pains and aches; that she had a lump on the left side of her head, about three inches above the ear, and that her head ached severely; that she was examined by Dr. Bacon, and afterwards by another physician at the hospital on behalf of defendant, but she did not know his name; that when she left the hospital and went to the home of Mrs. Gallagher, she was assisted by Mrs. Gallagher and another friend - a Mrs. O'Hara - and the nurses; that she was taken to Mrs. Gallagher's home in a cab; that the first two weeks she was confined to her bed and was attended by Dr. Shanahan; that afterwards she went to his office for treatment; that in March thereafter

she took a position, but left there after having been there only a week, because of her inability to endure the pain she suffered; that during this time and up to April she remained at the home of Mrs. Gallagher, until she went to the Francis Willard hospital and had an operation performed; that after being in the hospital two weeks and one day, she again returned to Mrs. Gallagher's and remained there continuously until June 13, 1916, when she accepted a position; that after that period she went to work at various places doing ^{general} housework; that she stayed at places from two weeks to five or six months; that while at work at these places she was very often sick for a week or more; that when she left these various places, it was because of severe headaches and pains in the back and side; that about October, 1912, she went to Mrs. O'Hara's, where she was living at the time of the trial, at which ~~time~~ she was still suffering from severe headaches and pains in her back and side; ^{and was unable to work regularly}; that when she felt well enough to work she would help a neighbor on Bowen Avenue; that at the time of the trial she weighed 180 pounds. Plaintiff further testified that prior to the accident she felt well, was not sick, and had never been troubled with pains in the back or on the right side.

Mrs. Rosale Gallagher and Mrs. Mary O'Hara, friends of the plaintiff, testified that before the accident the plaintiff presented the appearance of a person in good health.

Upon the testimony thus outlined expert testimony was offered as to the relation, if any, between the accident and the injuries sustained at that time, and the condition from which plaintiff was suffering at the time she was operated, namely, retroflexion of the uterus.

Dr. Benedict Shanahan, on behalf of the plaintiff, basing his testimony on the facts submitted in evidence by the plaintiff, testified that the condition of tenderness discovered

in the pelvic cavity on the first vaginal examination was due to trauma; that the condition of retroflexion found upon his examination six weeks or two months after the accident, was due to some external violence; and that the external violence and the pelvic condition as indicated by the tenderness that was found upon his first vaginal examination, so weakened the uterine structures that the uterus prolapsed; further, that there was a relation between the condition plaintiff was in at the time of the trial, and the accident in question. On cross-examination Dr. Shannahan stated that retroflexion of the uterus could follow from an accident.

Drs. Martin V. Bacon and Th. O. Krohn, in addition to testifying as to the condition of the plaintiff as found upon examination, also were called upon to testify as experts on the question as to the relation between the accident and the condition from which plaintiff suffered at the time of the operation, namely, retroflexion of the uterus. Dr. Arthur A. Small was also called as an expert upon this same question. All three of these physicians, while testifying as experts, stated, that based upon the hypothesis that the injury occurred as already stated in the testimony previously referred to; that there was no external evidence of physical violence; that one doctor had made an abdominal examination, finding no evidence or complaint of pain in the pelvic region, - there was no relation between the accident, and the condition of retroflexion of the uterus found six weeks after the accident. They further testified that retroflexion of the uterus could not result from an injury unless the injury was of a severe crushing or piercing character; that the condition of retroflexion is usually the result of a gradual wearing down of the ligaments supporting that organ; and that it frequently occurs in its gradual development among overworked, overtired, under-nourished and anemic women.

On this evidence, the instructions of the court, and arguments of counsel, the jury found the issues for the plaintiff and assessed her damages in the sum of \$2750. Motion for a new trial was overruled and judgment was entered upon the verdict, - from which judgment this appeal has been presented.

MR. JUSTICE PAM delivered the opinion of the court.

In urging a reversal of this judgment, defendant maintains:

- (1) That the verdict is manifestly contrary to the evidence on the issue of the extent of the damages, that the clear preponderance of the evidence shows that the disabilities claimed were not the result of the accident in question;
 - (2) That the court erred in the giving of certain instructions and in the refusal of others;
 - (3) That the finding against the defendant on the issue of damages and the award of damages for conditions for which defendant was obviously not responsible, were undoubtedly contributed to by the prejudicial statements of plaintiff's counsel.
- We shall discuss these contentions ad separatim.

In its first contention - that the verdict of the jury permitted plaintiff to recover damages for disabilities not the result of the accident in question - defendant relies in the main upon the testimony of the three physicians who were called on its behalf, - Drs. Martin W. Bacon, Wm. O. Krohn and Arthur A. Small. Dr. Bacon had been in attendance upon the plaintiff during the time she was in the Englewood hospital; Dr. Krohn made an examination on the second day after the accident; Dr. Small was placed upon the stand purely as an expert. These three witnesses for the defendant testified that retroflexion of the uterus is often the result of the gradual wearing down of the ligaments supporting that organ; that it is quite prevalent among women who have been com-

compelled to work hard during youth, doing heavy housework and being on their feet a great deal, and that it frequently appears in overtired, overworked and undernourished women.

Upon the hypothesis that, immediately following the injury sustained in an accident, examination of the person injured showed no discoloration, swelling, or other evidence of physical violence; that the person injured complained only of pains in the shoulder, head and back, but did not complain of any pains, either severe or slight, in the pelvic region; and further, that on the second morning after the accident, upon an abdominal palpation by a physician, there was no evidence of pain in the pelvic region although he depressed the abdominal wall three or four inches, and that the same examination showed that she was thin, pale, poorly nourished, of poor muscular type and anemic, presenting the appearance of an overworked, overtired girl; and upon the further hypothesis that the person injured, at the age of eleven years began helping take care of the housework in her own home; that at the age of fifteen she came to America, and from that time on worked continuously, first as a nursemaid and then doing general housework; that in the course of said work she was compelled to lift heavy objects and be on her feet constantly; that she suffered from slight headaches and also wore glasses in her early childhood, - the aforesaid physicians further testified that they saw no relation between the accident in question and the condition of retroflexion of the uterus from which plaintiff was found to be suffering six weeks or two months after the accident.

Dr. Shanahan, on behalf of the plaintiff, testified that three days after the accident, when he examined plaintiff at the home of Mrs. Gallagher upon her return from the Englewood hospital, while he found no bruises or abrasions, he did, however, find some swelling on the right shoulder and in the lumbar region of the back, also a contusion on the left side of the head; that the plaintiff

complained of severe pain in the back, shoulder and head, and said she ached all over; that he also made an internal and vaginal examination and at that time found marked tenderness in the pelvic region; that on the hypothesis that: the person so examined presented the aforesaid condition after an accident of a character similar to the one mentioned in the case at bar; that prior to said accident such person was in good health, not suffering from the pains complained of after the accident; that after the accident she suffered severe pains in the back; that she was sickly in appearance and emaciated; that she remained in bed two weeks after the accident; that upon trying to work she was compelled to desist by reason of pains and suffering; that for a period of six weeks she visited the physician at frequent intervals; that within six weeks or two months after the accident, upon another vaginal examination the ^{doctor} found she was suffering from retroflexion of the uterus. - Dr. Shannahan stated that there was a relation between the injuries sustained at the time of the accident and the fact that plaintiff was suffering of retroflexion of the uterus found six weeks after the accident in question.

Defendant contends: (1) That taking as true the testimony of plaintiff, that she was in good health prior to the accident; that she never suffered the pains in her back or side that she did after the accident; that there was no evidence of external violence as testified to by several physicians on behalf of the defendant; that no complaints were made of pains in the abdominal region; that plaintiff, in an abdominal palpation wherein the doctor depressed the walls of the abdomen three or four inches, did not evince any pain, - that under these circumstances the testimony of defendant's physicians showed by a clear preponderance of the evidence that there was no relation between the accident in question and the condition of retroflexion of the uterus from which the plaintiff was found to be suffering six weeks after the accident; and (2) that, taking into consideration the same evidence with reference to the condition of the plain-

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liff immediately after the accident and adding thereto the evidence that a physician examining her within twenty-four hours after the accident found that she was thin, pale and anemic, presenting the appearance of an overtired, overworked, underfed girl; also the evidence that she had worked from the age of eleven to the time of the accident, - a period of twelve years or more - that defendant had clearly shown by a preponderance of evidence that retroflexion of the uterus of which plaintiff was found to be suffering six weeks after the accident could not have been caused by the accident but was a condition which gradually developed because of the impoverished and poorly nourished condition of the plaintiff.

In making these various contentions, defendant places itself in a dilemma. The jury, on the first contention, has before it a healthy appearing girl doing housework for twelve years; never sick; never suffering the pains in the back and side prior to the accident; the accident occurred; a confinement in the hospital three days and suffering pains in the back, shoulder and head; an abdominal examination, however, disclosing no excruciating pain - which defendant's witnesses said would have been present if there had been a retroflexion of the uterus; an additional confinement in the home of a friend for two weeks; continued pain and suffering; an endeavor to work; compelled to leave because of pain and suffering; after frequent visits to a physician, a vaginal examination discloses the fact that plaintiff was suffering from a retroflexion of the uterus; and the positive testimony of Dr. Shannahan that there was a relation between the accident and this retroflexion of the uterus. It was a question for the jury to determine under these facts and circumstances, whether they were impressed more with the testimony of Dr. Shannahan as to the relation between the accident and the plaintiff's condition six weeks thereafter, or the testimony of the physicians for the defendant.

Under that history of the case and the evidence of Dr. Shannahan, the jury might properly conclude that there was a relation of cause and effect between the happening of the accident and the condition of plaintiff six weeks thereafter; because under the same history of the case, there was nothing in the testimony of defendant's expert witnesses either as to the facts or in the form of expert opinion based upon the facts in evidence, which could account for the condition of the plaintiff six weeks or two months after the accident. In arriving at the aforesaid conclusion, we are mindful of the fact that the three physicians placed upon the stand by the defendant testified that the condition of retroflexion of the uterus could not follow immediately after an injury unless the injury was of a crushing or piercing character; but we do not regard that their testimony was material, as there was no issue involving that medical fact presented in the case at bar, because neither Dr. Bacon nor Dr. Krohn nor Dr. Shannahan found any such condition of retroflexion of the uterus in the plaintiff immediately or within two or three days after the accident.

On defendant's second contention, the jury has before it a young woman about twenty-five years of age, who had been compelled to work since early childhood, meeting with an accident; that immediately after said accident, while complaining of pain in the shoulder and back, showed no abrasions, contusions or any external evidence of physical violence; that on the second day after the accident a physician found that she was pale, thin, emaciated, having the appearance of an underfed, overtired and overworked woman; that no complaint was made of pain in the pelvic region, although the abdomen was palpated and depressed to the extent of three or four inches by one of the physicians in the course of an examination; and the testimony of the three physicians that retroflexion of the uterus from which plaintiff was suffering six weeks after the accident was not

and the various parts of the system are as follows:—

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due to the injuries sustained in the accident, but due to natural causes arising from her emaciated, impoverished, physical condition. (The issue is made upon the fact that six weeks thereafter she was suffering of retroflexion of the uterus.)

While the jury may have believed that the plaintiff was thin, pale, emaciated, presenting the appearance of an impoverished, overworked, overtaxed woman; and while the jury may have also believed that retroflexion of the uterus does not immediately follow an accident unless the injury is of a severe crushing or piercing character, - although we have already stated that this testimony is not material because no such condition existed immediately or within two or three days after the accident; and although the jury may have believed that retroflexion of the uterus frequently is of gradual development in women compelled to work during their youth and be on their feet considerably, - yet, believing all these facts, the jury are not concluded by the opinions of the doctors who testified for the defendant that retroflexion of the uterus from which the plaintiff was found to be suffering six weeks after the accident was not due to the accident but from natural causes, - they had the right also to take into consideration the fact that there was no evidence of any pelvic disturbance upon an examination shortly after the accident by Dr. Bacon of the Englewood Hospital; that there was no evidence of any excruciating pain in the pelvic region upon a severe abdominal palpation by Dr. Krohn on behalf of the defendant within thirty-six hours after the accident; and the further fact that plaintiff testified that she had been working steadily for many years and had never suffered pains in her back and side prior to the accident, - and the jury had the right, in view of the unusually poor physical condition in which defendant's witnesses stated she was immediately after the accident, to come to the conclusion that the injuries sustained in the accident in question were of a sufficiently severe char-

acter as to be the proximate cause in bringing about in a period of six weeks or two months an actual retroflexion of the uterus; and such belief on the part of the jury, in our opinion, is not inconsistent with any of the expert testimony offered on behalf of the defendant.

Defendant in urging the aforesaid contentions, repeatedly asserts that the fact that force of the impact was only slight, has an important bearing in determining the character of the injuries sustained by the plaintiff in the accident. The jury, however, may well have thought that the extent of the injuries was not necessarily measured by the force of the collision; it is a well known fact that a person may fall from a great distance and yet sometimes not injure himself, and again, through a slight misstep, may suffer a serious injury. In the case at bar, defendant offered testimony that the cars at the time of the impact were running at a speed of only two or three miles per hour, and that while windows were broken, no damage was done to the wood or iron work in the cars; yet the jury had the right to view such testimony in the light of the fact that Thomas Murphy, holding onto a strap was thrown to the floor by reason of the strap breaking when the collision occurred. While defendant claims that the conductor of the car first saw plaintiff one-half carlength away, standing on the ground, and that he walked with her to a saloon, plaintiff's testimony is to the effect that she was carried by Mr. Murphy and someone else into the saloon and then taken to the hospital. The fact is undisputed that she was in the hospital three days, and after being taken to the home of Mrs. Gallagher in a cab, she was confined to bed two weeks after the accident. The jury may well regard these facts as being indicative of the severity of the injuries sustained by plaintiff at the time of the accident. Dr. Bacon who was the first physician to examine plaintiff stated that "she was

considerably shaken up and had a sore arm and a sore shoulder, and had probably received some jolt through the back." The jury had the right to take into consideration all these facts, in determining whether or not the injuries received at the time of the collision were as severe as, - on either contention of the defendant - could have brought about the condition with which plaintiff was found to be suffering within six weeks or two months after the accident.

Defendant maintains that at best, from all the testimony in the case, any conclusion which the jury might arrive at as to the relation between the accident and the disabilities which form the basis of this suit, would be mere conjecture. In that view we cannot concur, as we believe under either contention made by defendant, the jury were warranted in finding that there was an actual relation between the accident in question and the condition of retroflexion of the uterus that plaintiff was found suffering with six weeks or two months after the accident. We cannot, therefore, subscribe to the contention of the defendant that the jury clearly and contrary to the weight of the evidence permitted the plaintiff to recover damages for disabilities not the result of the accident in question.

Defendant next contends that the court erred in the giving of certain instructions on behalf of the plaintiff and in the refusing and modification of others on behalf of the defendant. Defendant maintains that its offered instructions 1, 2 and 3 stated a correct principle of law, and that no other instructions embodied such principle of law; and that the court therefore erred in refusing to give instructions 1, 2 and 3 offered on its behalf. Defendant was not entitled to all three instructions, because they were purely repetition. Two of them - the first and third - were bad in form. Instruction No. 2, we believe, could properly have been given. However, together with those instructions, defendant

offered instructions 13, 14 and 15, which related to the same subject matter; the only difference being that they did not refer directly to the fact that plaintiff left the hospital earlier than advised to by her physician. All three of these instructions - 13, 14 and 15 - however, clearly presented to the jury the principle of law set forth by counsel in instructions 1, 2 and 3, to only one of which it was entitled; in the giving of these three - 13, 14 and 15 - the jury had the benefit of the subject matter that was embodied in instructions 1, 2 and 3; and therefore defendant was not entitled to any additional instruction. In presenting several instructions embodying the same proposition in varying language, defendant permitted the court to determine which instructions the court thought proper to give under the facts and circumstances in evidence; and defendant cannot be heard to complain because the court refused the one defendant considered most important, where the others were given. This principle has been expressly approved in the case of Railroad Co. v. Otis, 212 Ill. 429, and has since been enunciated in later decisions. Riley v. Richardson, 224 Ill. 44; Railroad Co. v. Zick, 229 Ill. 100; National Knitting Co. v. McFarlane, 237 Ill. 137.

Defendant complains of instruction No. 4 given on behalf of the plaintiff, which bears upon the question of the amount of damages plaintiff was entitled to recover, and which was the only instruction given on her behalf. We have carefully examined the authorities cited by counsel in support of its contention that the court erred in the giving of this instruction, but do not believe the facts in these cases are applicable to those in the case at bar. An instruction in the identical form has been approved in other cases, and we think it was proper under the facts and circumstances herein.

There remains but the third contention of defendant - that the finding against the defendant on the issue of damages, and the

award of damages for conditions for which defendant was obviously not responsible, were undoubtedly contributed to by the prejudicial statements of plaintiff's counsel.

Counsel for defendant devotes many pages - both in its original and in its reply brief - upon this point; many authorities have been cited in support of its contention. On examination of the record, we find that as to the first statement in the opening argument of counsel for plaintiff, objected to by counsel for defendant, the court in its ruling did not indicate that such statement was objectionable, but suggested that counsel for plaintiff had perhaps gone far enough; and in that view we concur. The second statement in the opening argument objected to, was the closing paragraph thereof. No objection was made to such statement at the time of the trial.

Defendant then complains of certain language employed by counsel for plaintiff in his closing argument to the jury, wherein reference was made to Drs. Krohn and Small, witnesses on behalf of defendant. The first part of the statement, - wherein he referred to the aforesaid witnesses as professional experts - was not objected to, but counsel for defendant interjected a question reflecting upon Dr. Shammahan, witness for the plaintiff. Counsel for plaintiff then proceeded to answer this question, and certain language employed in doing so was objected to; the court sustained the objection and instructed the jury to disregard the same. In view of the character of the interjected question and the closing argument made by counsel for the defendant, we believe that the character of the closing argument by counsel for the plaintiff cannot be criticised; and we further believe that the argument in its entirety is not of that character as to come within the criticism the court applied to arguments in cases cited by counsel for the defendant. Furthermore, we are of the opinion that under the facts

amount of the
and circumstances in evidence, the [^]verdict clearly showed that
the jury were not swayed by sympathy, passion or prejudice.

Finding no reversible error, the judgment of the Circuit
Court will be affirmed. .

AFFIRMED.

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488 - 19871.

JENNIE PHILIPPE,
Appellee,

vs.

JOHN J. CURRAN and ISABELLA
CURRAN,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 433

STATEMENT OF THE CASE. This is a suit brought in the Municipal Court of Chicago by Jennie Philippe, hereinafter referred to as the plaintiff, against John J. Curran and Isabella Curran, hereinafter referred to as the defendants, to recover damages on a penal bond executed by the said John J. Curran as principal, and Isabella Curran as surety. John J. Curran purchased from the plaintiff for the sum of \$30,000, a piece of real estate encumbered with a mortgage of \$4,000. No cash passed in the transaction, but in addition to assuming the \$4,000 mortgage, John J. Curran executed a ten-year mortgage for \$30,000 bearing interest at the rate of five per cent., and also entered into a bond - the bond sued on in this case - with himself as principal, and Isabella Curran as surety; the condition of the said bond was as follows:

"whereas said John J. Curran has this day purchased from Jennie Philippe the premises known and described as the North twenty-five (25) feet of the South one hundred (100) feet of Lot seventeen (17) in Block one hundred and twenty-four (124) in School Section Addition to Chicago, otherwise described as Lot five (5) in the Assessors Division of said Lot seventeen (17), situated in the City of Chicago, Cook County, Illinois, and as part consideration therefor doth promise, undertake and agree that he will within one year from the date hereof erect a building or improvements upon said premises which shall cost not less than Ten Thousand (\$10,000) Dollars, and shall and will pay promptly at maturity, all claims for labor or materials used in the construction of said building or improvements, and will and shall indemnify and save said Jennie Philippe harmless from any and all mechanics liens and claims or demands of every kind or nature arising or growing out of the erection of said building or improvements;

"Now if the said John J. Curran shall fully and faithfully perform all of the agreements and undertakings on his part hereinabove mentioned, then this obligation to be void, otherwise to remain in full force and effect."

John J. Curran did not erect any building or improvements upon the property either within the time provided for in the bond or at any time thereafter. In June, 1912, the trust deed executed by John J. Curran for \$30,000 was foreclosed; the plaintiff became the purchaser at the foreclosure sale of the property conveyed in said trust deed, at a sum considerably less than the amount found due in the decree of foreclosure, and on June 7th of that year was given a deficiency decree for \$8488.48. On the next day - June 8th - plaintiff began this action against John J. Curran and Isabella Curran, to recover damages for the failure of the defendant John J. Curran to erect on the premises that had been foreclosed, an improvement at a cost of not less than \$10,000, as provided for in said bond.

The original statement and affidavit of claim was filed June 8th, and attached thereto was a copy of the instrument sued on. On June 26th, an amended statement of claim was filed, which was in the following words:

"Plaintiff's claim is for damages sustained by reason of defendants not performing the conditions of their certain bond, a copy of which is attached to the original statement of claim filed herein, and which bond is sued upon in this case. The amount of plaintiff's damages, under said bond, are fixed by a deficiency decree rendered in the foreclosure proceedings of Philippe vs. Curran et al. in the superior Court of Cook County, Illinois, which proceeding was to foreclose a trust deed to secure the payment of a \$30,000 note given by the defendant John J. Curran, in part payment of the purchase price for the property mentioned in said bond sued upon herein; that at the time of the purchase of said property said Curran gave, as the full purchase price for said property his note of \$30,000 secured by said trust deed, and also the bond sued upon in this case; which bond is conditioned that the said Curran will erect, on said premises so sold, within one year from the date of sale, a \$10,000 building; that said building was to be additional security on account of said note; that said Curran did not build said building and that thereby the property was scant and insufficient security for the payment of said \$30,000 note, and that the sale under said foreclosure of said premises did not bring enough to satisfy said note and costs found due thereunder in said proceedings, and thereafter a deficiency decree was entered in said foreclosure proceeding for Five Thousand Four Hundred Thirty-five Dollars and Forty-two Cents (\$5,435.42), which is the amount of the damages sustained by said plaintiff by reason of the defendant not erecting said building on accordance with the contract and the conditions of said bond;

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that if said building had been erected the property would have been of sufficient value to have satisfied the \$30,000 note and all costs and expenses found due thereunder; that by reason whereof the plaintiff has sustained damages under said bond to the amount of \$5,435.42, together with interest thereon from the date of said deficiency decree at the rate of 5 per cent. per annum."

And on August 4, 1912, the defendant, Isabella Curran, filed an affidavit of merits. A jury having been waived, the cause was submitted to the court for trial. The court found the issues against the defendants in debt in the sum of \$10,000, and assessed plaintiff's damages in the sum of \$5,639.28, upon which finding the court entered judgment, - from which judgment this appeal was prosecuted.

MR. JUSTICE PAW delivered the opinion of the court.

On the trial of the case plaintiff offered in evidence the bond sued on and the files in the case of Philippe v. Curran et al., Sen. No. 392,455 Superior Court of Cook County, which was the foreclosure proceeding brought by plaintiff against John J. Curran on the trust deed given in the real estate transaction referred to in the statement of facts, and in connection with which the bond sued on in this case was given. The plaintiff in this case relies on the bond itself, the deficiency decree entered in the said foreclosure suit, and the rules of the Municipal Court, which were also made a part of this record. No evidence was offered on behalf of the defendant; and upon this state of the record the court entered the finding and judgment complained of.

Defendant in her brief and argument assigns many errors, but in our view of the case, to arrive at a determination thereof it is necessary to pass upon only one, viz., that in the present state of the record the court erred in finding that the amount of the deficiency decree entered in the aforesaid foreclosure proceeding was the proper measure of the damages sustained by the plaintiff because of the breach of the condition of the bond in question.

To meet this contention, plaintiff depends here - as she did in the trial below - upon the rules of the Municipal Court. Plaintiff insists that the affidavit of merits did not deny the state of facts set forth in her amended statement of claim, and that therefore under rule 19 of the Municipal Court, plaintiff was not required to prove them, but all facts set forth, ^{and not denied} would be taken as admitted; and contends further, that the amended statement of claim, having set forth as a fact that the deficiency decree constituted the damages sustained by plaintiff owing to the failure of the defendant John J. Curran to comply with the conditions entered into by himself as principal and Isabella Curran as surety, in the bond sued on, it was only necessary to introduce the decree itself to prove her case on the issue as made up by the amended statement of claim and the affidavit of merits.

Rule 19 of the Municipal Court provides as follows:

"Every allegation of fact in any statement of claim or of counter-claim or set-off if not denied specifically or by necessary implication in the affidavit of defense in reply by the opposite party, shall be taken to be admitted except as against an infant or a lunatic."

The first paragraph of defendant's affidavit of merits is as follows:

"That she is not liable to the plaintiff on the bond described in plaintiff's second amended statement of claim in any sum or amount."

This was in effect a plea of the general issue to the plaintiff's amended statement of claim which, as was held in the case of Walter Cabinet Co. v. Russell, 250 Ill. 413 (p. 420), presented the issues in the case.

We are of the opinion that under Rule 19, this paragraph in the defendant's affidavit of merits did by necessary implication deny the statement of facts, if any, that made up the issue presented by the plaintiff's statement of claim. Moreover, we have carefully examined this amended statement of claim, and cannot find therein any facts set forth from which the court had the right to

conclude that the defendant admitted that the amount of plaintiff's damages for breach of the said bond were fixed by the amount of the deficiency decree.

The allegation in said amended statement of claim: "The amount of plaintiff's damages, under said bond, are fixed by a deficiency decree rendered in the foreclosure proceedings of Philippe vs. Curran, et al. in the Superior Court of Cook County, Illinois, which proceeding was to foreclose a trust deed to secure the payment of a \$30,000 note given by the defendant John J. Curran, in part payment of the purchase price for the property mentioned in said bond sued upon herein," is a conclusion and a statement of the law of the case relied upon by the plaintiff. The further allegation: "That said building was to be additional security on account of said note; that said Curran did not build said building and that thereby the property was scant and insufficient security for the payment of said \$30,000 note," does not set forth a fact, but merely a conclusion and a process of reasoning. The amended statement of claim, after alleging that the sale under the foreclosure did not bring enough to satisfy the note, ^{on} went to state: "And thereafter a deficiency decree was entered in said foreclosure proceeding for Five Thousand Four Hundred Thirty-five Dollars and Forty-two Cents (\$5,435.42), which is the amount of the damages sustained by said plaintiff by reason of the defendant not erecting said building in accordance with the contract and the conditions of said bond." We cannot regard said language as a statement of fact, but merely a conclusion as to the ad damnum. And when the statement of claim proceeds further and says: "That if said building had been erected the property would have been of sufficient value to have satisfied the \$30,000 note and all costs and expenses found due thereunder," it is merely indulging in a conjecture and not setting forth a fact. Nowhere in said amended statement of claim are any facts set up which,

even though admitted, would permit plaintiff to introduce the deficiency decree as the measure of damages sustained by the plaintiff because of a breach in the condition of the bond sued on.

The court below evidently was of the opinion (1) that there were facts in said statement of claim which made the deficiency decree clearly the measure of damages; and (2) that the affidavit of merits did not deny such facts, and entered a finding and judgment accordingly. In doing so, the court committed reversible error.

For the reasons hereinabove assigned, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

20064
111 - 20064.

290

R. P. LAMONT, Trustee,
Defendant in Error,

vs.

U. S. REDUCTION COMPANY,
a Corporation,
Plaintiff in Error.

FILED TO

MUNICIPAL COURT

OF CHICAGO.

191 I.A. 446

STATEMENT OF THE CASE. This is an action brought in the Municipal Court of Chicago by R. P. Lamont, trustee, hereinafter called the plaintiff, against the United States Reduction Company, a corporation, hereinafter called the defendant, to recover rent claimed to be due under a certain written lease. Upon the trial of the case by the court, a jury having been waived, the court found the issues for the plaintiff, and assessed the plaintiff's damages in the sum of \$267.33, for which amount judgment was recovered, - to reverse which defendant has sued out this writ of error.

MR. JUSTICE FRAK delivered the opinion of the court.

On March 14, 1911, plaintiff leased the defendant space in a building known as the Western Electric Building, located at 112 South Clinton street, in the city of Chicago, for a period of two years from May 1, 1911, at a rental of \$100 per month. A written lease was executed to evidence the agreement between the parties; it was negotiated through Alexander Friend, a member of the firm of Alexander Friend & Company, real estate agents, which firm had in charge the management of this building and the collection of rents for the plaintiff. About the end of March or the beginning of April, - at least, prior to the beginning of the term of the written lease entered into between the parties - defendant discovered it needed more space. Defendant contends that because of this fact, the president and secretary (Henry Lindenberger and Leo Wenk respectively) of defendant called at the office of Alex-

OFFICIAL

THE OFFICIAL RECORD OF THE
PROCEEDINGS OF THE
GENERAL ASSEMBLY OF THE
STATE OF NEW YORK
Held at Albany, on the 1st day of
January, 1891.
IN SENATE.
January 1st, 1891.
The Senate met at 10 o'clock
A. M. The President, Mr. [Name],
called the session to order. The
prayer was read by the Rev. Mr. [Name].
The Journal of the previous session
was read and approved. A message
from the Governor was read.
The following bills were introduced:
[List of bills and their sponsors]

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
JANUARY 1ST, 1891.
ALBANY: PUBLISHED BY THE
STATE OF NEW YORK.
1891.

under Friend & Company, the renting agents of plaintiff, and took up with Mr. Alexander Friend the question of securing additional space. Both Mr. Lindenberger and Mr. Wenk testified that after having arrived at an agreement as to the exact character of the additional space to be added to what had already been rented under the written lease, Mr. Lindenberger stated to Mr. Friend that he would be willing to take the original space and the new space for a term of one year, at a monthly rental of \$125; that Mr. Friend replied that it was immaterial whether he made a lease for one or five years, and agreed that defendant should have the entire space for one year at a rental of \$125 per month; that thereupon Mr. Wenk, who had the written lease with him, handed it to Mr. Friend; that Mr. Friend took it and said, "I will mail you a new lease for a period of one year."

Mr. Friend, a witness on behalf of the plaintiff, testified that at the time the additional space was discussed, he did not remember Mr. Lindenberger being present; he stated positively, however, that he did not discuss the question with Lindenberger or state to him that he could have a lease for the old space and the additional space at a rental of \$125 per month for one year, but stated that he did have an interview with Mr. Wenk on this subject; that after discussing the question of space, it was agreed that the rental of the original space and the new was to be \$125 per month, and that the term of rental should be for the same period as the ^{written} xxx lease, namely, two years - in other words, that it was merely adding ^{written} \$125 to the xxx lease for the additional space not included in the written lease; and that he was to prepare a new lease for a term of two years, for the new arrangement, upon the delivery of which the written lease would be taken up; he furthermore denied that Wenk at any time surrendered the old lease to him, or that defendant's copy ever came into his possession; that no new lease, however, was actually drawn; it was ad-

mitted that defendant took possession of the original space provided under the written lease and the additional space, on May 1, 1911, and continued in actual physical possession thereof until April 30, 1912, paying during said year the sum of \$125 per month rent.

Defendant contends that the check in payment of the last month's rent contained the words "in full of lease expiring April 30, 1912." Two witnesses testified that these words were on the check before it was delivered and accepted by the plaintiff; while two witnesses for the plaintiff, through whose hands the check passed in the course of business of Alexander Friend & Company denied that these words were on the check when it was received from the defendant.

As is ~~xxxx~~ stated by the defendant in the course of its brief, these ~~are xxxxxxxx controverted facts; xxxxxxxxxxxxxxxxxxxx~~
the

- (1) Whether or not Lindenberger was present at the time the conversation took place for the additional space;
- (2) Whether or not Wenk returned the original lease;
- (3) Whether or not the check in payment of the last month's rent contained the words "in full of lease expiring April 30, 1912" when it was first received by plaintiff's renting agent, Alexander Friend & Company;
- (4) Whether the parcel agreement was for one or two years.

If the case had been submitted to a jury, these questions of fact would ^{all} have been for their determination. As it was, however, they had to be determined by the court sitting as a jury; and the court in its finding of facts disposed of these questions in favor of the plaintiff, viz.:

- (1) The court refused to hold, when requested to by the defendant, that Wenk surrendered defendant's copy of the original lease; or that a new lease was to have been prepared and submitted for the defendant's execution, including the original space and the

additional space, at a rental of \$125 per month, for the term of one year beginning May 1, 1911 and ending April 30, 1912, and that the prior lease entered into was to have been canceled. The court based its refusal to so hold on the ground that the defendant had failed to prove these facts by a preponderance of evidence. These facts which defendant asked the court to find were in support of its claim that the written lease had been surrendered and canceled and that a new parol agreement had been entered into; and upon this contention defendant had to show these facts by a preponderance of evidence. The court sitting as a jury was compelled to weigh the evidence, and it clearly came to the conclusion not only that the defendant had failed to establish these facts in support of its claim by a preponderance of evidence, but on the contrary, found as a fact, that the agreement entered into by Friend as agent of the plaintiff, with the defendant, for a new lease to cover the premises formerly covered by the lease actually executed by the parties and such additional space as was then agreed upon, was to cover a period of two years, viz., until April 30, 1913.

(2) The court also refused to hold that at the time defendant delivered to the plaintiff the check in payment of the last month's rent, the check had on it the words "in full of lease expiring April 30, 1912," on the ground that defendant had not shown that fact by a preponderance of the evidence.

Defendant contends that the court erred in its finding of these controverted facts in favor of the plaintiff, in that such findings is clearly and manifestly contrary to ^{the} weight of _{the} evidence.

We regard the question as to whether or not the parol agreement was for one or two years as determinative of the issues in this case, the fact as to whether Wenk returned the written lease or Lindenberger was present at the time of the first conversation with reference to renting additional space, are facts

which, if proven, could be taken into consideration by the court in arriving at a conclusion on the question as to whether the parol agreement was for one or two years. This is true also as to the fact whether or not the receipt for rent for the month of April 30, 1912, at the time of its delivery to Alexander Friend & Company, plaintiff's renting agents, contained the words "in full of lease expiring April 30, 1912," although defendant also contends that the acceptance of this check with these words on it acted as an accord and satisfaction.

While it is true that on this question as to whether the parol agreement was for one or two years the testimony of Mr. Friend, on behalf of the plaintiff, is denied and contradicted by the testimony of both Lindenberger and Funk, witnesses for the defendant, yet the preponderance of evidence is not necessarily determined by the number of witnesses alone. The court trying this case without a jury, saw and heard all of the witnesses testifying, and in arriving at its conclusion it had the right to take into consideration the appearance and demeanor of the witnesses on the stand. The court no doubt came to the conclusion that the testimony of Friend, on behalf of the plaintiff, was more in accordance with truth and reason than the testimony of the witnesses for the defendant. We would not be warranted in disturbing the finding of the court on this question of fact as to whether or not the parol lease was for one or two years, unless it was clearly and manifestly against the weight of the evidence. In the case of Hagg v. Killobray, 209 Ill. 193, the court said (p. 200):

"Where the trial court, in a trial without a jury, has had an opportunity of seeing the witnesses act of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence."

In the case of Quivart v. Carpenter, 96 Ill. 63, the court says, speaking through Mr. Justice Mulkey:

"It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words of the witness as transcribed upon the record, knowing at the same time, from actual experience, that more or less of what the witness actually did say is always lost in the process of transcribing. But the main difficulty does not lie here. There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However artful a corrupt witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bearing on the stand that betrays him, and thereby destroys the force of his testimony. Many of the real tests of truth by which the artful witness is exposed, in the very nature of things, can not be transcribed upon the record, and hence they can never be considered by this court."

Having in mind the views so clearly expressed in the above quotations, and after a careful examination of the record, we are of the opinion that under the facts and circumstances in evidence in this case, the finding of the court that the parol agreement was for two years, was not clearly and manifestly against the weight of the evidence.

Defendant, however, further contends that even though this parol agreement was for two years, it was not void under the statute of frauds, but operated as a waiver, surrender or cancellation of the written lease. Defendant maintains that the plaintiff having acted upon this parol agreement by accepting rent at the increased rental of \$125, having given receipts in which it was stated that the \$125 was as per lease, partly performed the contract under the new lease and acknowledged defendant's possession of the premises thereunder, and therefore plaintiff is denied the right of claiming the benefit of the statute of frauds. In making this argument defendant forgets that this is an action at law and not one in equity, where such possession and part-performance under the parol lease might take the case out of the statute of frauds, but the rule is differ-

ent at common law. In the case of Leavitt v. Stern, 130 Ill. 526, the court said:

"It is well established that part performance of a contract not enforceable because of the statute of frauds, does not operate, in an action at law, to take the case out of the statute."

The court goes on to quote from the decision in the case of McGinnis v. Fernandez, 130 Ill. 528:

"The well settled rule of law is, that a verbal contract within the condemnation of the statute of frauds cannot be enforced in any way, either directly or indirectly, and cannot be made either the ground of a demand or the ground of a defense."

The court has found it a fact that this parol lease was for two years, which brings it within the condemnation of the statute of frauds, and under the rule of law laid down in the case of Leavitt v. Stern, supra, and McGinnis v. Fernandez, supra, could not operate as a waiver, surrender or cancellation of the written lease.

The defendant further contends that the statute of frauds did not render the parol lease void but only voidable; yet, upon that contention it did not become a good consideration for the cancellation of the written lease unless it was fully executed or put in writing, as contemplated by the agreement. It is admitted that the defendant did not remain in possession longer than April 30, 1913, and it had refused to pay the rent for May and June following, to recover which this suit has been instituted. The defendant by its acts and claims in evidence in this case shows that it had elected to avoid this new agreement, and having done so it cannot claim benefit of it as a consideration for the cancellation and surrender of the written lease.

Defendant cited many authorities to the effect that a lease, even though under seal, may be abrogated by a parol agreement. That such is the law there is no doubt; but in view of

the finding of facts by the court below, - in which we have concurred - this principle of law is not applicable.

Counsel for the defendant, in a paragraph of their brief, in a general way state that the court erred in refusing to hold certain propositions of law. In view of its findings of fact, we believe the rulings of the court upon these propositions of law were correct.

Finding no reversible error, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

MARGARET McDONNELL,
Defendant in Error,

vs.

W. IRVING OSBORNE, GEORGE G. MOORE,
and D. B. HANNA, Receivers of the
CHICAGO & MILWAUKEE ELECTRIC RAIL-
WAY CO.,

Plaintiffs in Error.

Error to
Superior Court,
Cook County.

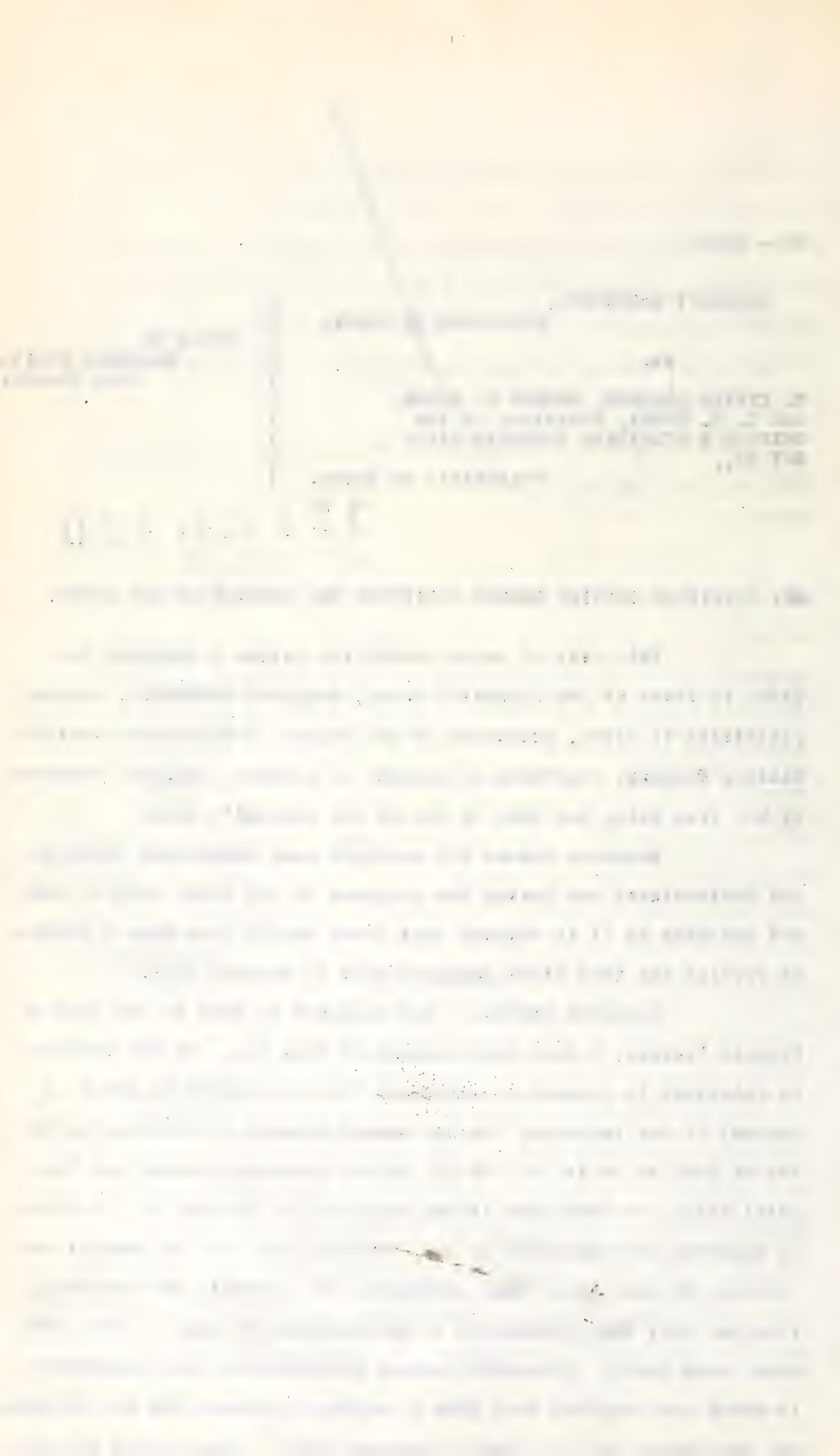
1911.A. 450

MR. PRESIDING JUSTICE BANNER DELIVERED THE OPINION OF THE COURT.

This writ of error brings for review a judgment for \$1700 in favor of the plaintiff below, Margaret McDonnell, against plaintiffs in error, receivers of the Chicago & Milwaukee Electric Railway Company, recovered on account of personal injuries received by her from being run into by one of the company's cars.

Numerous errors are assigned upon exceptions taken to the instructions and during the progress of the trial that we need not consider as it is evident that there should have been a directed verdict and that final judgment must be entered here.

Margaret McDonnell was employed as said in the home of Francis Lockner, a well known member of this bar. At her request he undertook to procure a settlement with plaintiffs in error on account of her injuries. On his second attempt he obtained an offer of \$250 to be in full of all claims including doctor and hospital bills, on condition of her executing a release, all of which he reported and explained to her, advising her that he thought acceptance of such terms was preferable to a lawsuit and receiving from her what was tantamount to instructions to make a settlement upon those terms. Thereupon Lockner communicated with plaintiffs in error and received from them a prepared release from her to sign, and two checks to her order aggregating \$250. She signed the for-



her and endorsed the letter. The amount, at her request, was placed to her credit with Lackner's firm, and out of it she checked sufficient to pay said bills, the receipt for which she held at the time of the trial, and some cash for herself leaving \$100 that still stands to her credit as aforesaid. She did not deny such disposition of the money nor that she signed the release, but claimed that she did not understand the nature or purport of the document.

We need not review her evasive and equivocal testimony on this subject or discuss the effect that should be given it. It is enough to say that there is nothing obscure or ambiguous in the instrument; that it is as plain and explicit in its terms and meaning as language can well make it, expressly releasing and discharging the company, its receivers and agents from all liability on account of her injuries so received; that she was mentally competent to know what she was doing when she signed it; that there is no proof or charge of fraud or deceit touching the execution of the instrument, nor evidence from which inference of any could reasonably be drawn; that it was executed not in the presence, or under the influence, or at the request of any representative of plaintiffs in error, but in the presence of her own agent with nothing said or done by him that could possibly be construed into a trick or device to deceive. She was, therefore, chargeable with full knowledge of the contents and effect of the instrument signed by her, even though we accept her very inconsistent and improbable version as to her understanding of the matter. She both denied and admitted that Lackner read the document to her but explained it by saying that it was not read "loud" and she "turned away," and was feeling poorly at the time. Nevertheless, she seems to have been willing to sign an instrument she was told to read, without seeking knowledge of its contents. We think the evidence is very

clear that she understood what she was signing, and her flimsy and specious explanations of the matter serves to confirm that conclusion.

Upon such a state of facts the court should not have submitted to the jury the question of fact as to the validity of said release, there being no evidence of fraud in its execution. The release unimpeached constituted a bar to recovery. It is unnecessary to review the authorities on this subject. It is enough to refer to Turner v. Consumers Coal Co., 254 Ill. 187, and the cases there cited.

But plaintiff's own testimony clearly shows that she was guilty of contributory negligence. She was hurrying, intending to take a southbound car. She was approaching the platform from the west end and had to cross first the parallel tracks used by the northbound cars and then the tracks on which the car was approaching. She admits she heard the car and saw the reflection of its headlight on the tracks before she saw the car itself, and shortly afterward saw, continued to look at, and signalled it before she reached the northbound tracks, and even while crossing them and up to the time she stepped on the east rail of the track the car was coming on, in fact, up to the very moment she was struck. The summary of her testimony is that she misjudged its distance and speed. Even though the company was negligent, as claimed in the declaration, both her manifest failure to exercise due care for her own safety as shown by her own evidence and execution of said release without proof of fraud walled for an instructed verdict for defendants. (See Button, Admr. v. Aurora, Elc. & Chi. Ry. Co., 166 Ill. App. 299, and cases cited.) The judgment will be reversed.

REVERSED.

FINDING OF FACT.

We find that defendant in error, Margaret McConnall, was guilty of negligence contributing to her injuries, and that in consideration of \$250 received by her from plaintiffs in error, W. Irving Osborne, George G. Moore, and C. E. Hanna, Receivers of the Chicago & Milwaukee Electric Railway Company, she knowingly, without fraud or deceit in the procurement thereof, signed an instrument releasing and discharging said company and said plaintiffs in error from liability on account of such injuries.

G. A. CRANCER COMPANY,
Plaintiff in Error,

vs.

C. P. WILLIAMS, C. L. WILLIAMS and
WERNER BROS. EXPRESS & STORAGE COM-
PANY,
Defendants in Error.

Error to
Municipal Court
of Chicago.

1911 A. 451

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The G. A. Crancer Company made a conditional sale of a piano to one C. L. Williams, the title therein to remain in the vendor until paid for. One of the conditions was that it was not to be removed from said Williams' residence in Norfolk, Nebraska, without the vendor's consent. The piano was removed without such consent and placed in the storage house of Werner Bros. Express & Storage Company in Chicago. Later C. P. Williams brought attachment proceedings against C. L. Williams in the Municipal Court of Chicago, and claims to have obtained a judgment in rem and a special execution thereon, under which the piano was levied on and sold, he bidding in the property and leaving it in charge of said storage company. There-upon said G. A. Crancer Company, plaintiff in error, replevined the piano, making both C. P. and C. L. Williams and the Storage Company parties to the suit. The sole issue was whether the title of the vendor of the piano was defeated by the execution sale. The Storage Company was dismissed out of the case. The trial was had before the court without a jury, and the court found that the right of possession of the property replevined was not in the plaintiff, and entered judgment for one cent damages and costs in favor of C. P. and C. L. Williams, and awarded the writ of retorno habendo. This writ of error brings that judgment before us for review.

First, it is apparent there could in no event have been

a joint judgment for damages. If C. P. Williams obtained title under the execution sale, he alone was damaged by the taking and detention of the property under the replevin writ. And there could be no judgment for costs in favor of C. L. Williams, for not having entered his appearance, he incurred none.

But there is another reason why the judgment must be reversed. To justify his claim to title under the execution sale said C. P. Williams was required to prove the existence of a judgment upon which the execution issued. The G. A. Crancer Company was a stranger to that judgment and was claiming title to the property. It has been frequently held in cases where an officer was sued either in an action of replevin or an action of trespass, that the execution was sufficient to protect him if the suit was by a party against whom he held the execution, but that when he levies upon the goods of a third person, a stranger to the execution, he must produce the judgment as well as the writ to justify the seizure. The principle is fully discussed in Jackson v. Hanson, 4 Scam., 411, and has been followed in subsequent cases. (Johnson v. Holloway, 20 Ill. 334; Hartman v. Cochran et al., 7 Ill. App. 543; Aukler v. Traver, 5 id. 614; Calumet Paper Co. v. Knight & Leachard Co., 43 id. 386; Shue v. Ingles, 27 id. 528; Schaeferhorn v. Mitchell, 13 id. 418.) The same principle was applied in Bartleson v. Mason, 51 id. 644, where, as here, it was sought to replevin the property not from the officer but the judgment creditor who purchased the property at the execution sale.

In the case at bar, defendant in error, Williams, made proof of the execution but not the judgment. He introduced what is referred to as the "half sheet," a term used in the Municipal Court, presumably to designate the record of its proceedings including the judgment. It consists of a jumble of letters conveying no meaning unless explained, and no interpretation of them was furnished. If they represent an entry of the judgment sought to be proven, then,

The first of these is the fact that the British Empire is not a homogeneous entity. It is a collection of many different peoples, races, and religions, each with its own customs and traditions. This diversity is one of the strengths of the Empire, but it also presents challenges. The British must learn to respect and understand the differences between the various peoples of the Empire, and to work together to build a united and prosperous future.

The second of these is the fact that the British Empire is not a static entity. It is constantly changing and evolving. The British must be able to adapt to the changing circumstances of the world, and to the changing needs of the peoples of the Empire. This requires a flexible and dynamic approach to governance, and a willingness to learn from the experiences of others. The British must also be able to work with the peoples of the Empire to build a future that is better than the present.

The third of these is the fact that the British Empire is not a perfect entity. It is not without its faults and weaknesses. The British must be able to recognize these faults and weaknesses, and to work to improve them. This requires a willingness to listen to the criticisms of others, and to be open to change. The British must also be able to work to build a more just and equitable society for all the peoples of the Empire.

The fourth of these is the fact that the British Empire is not a permanent entity. It is subject to the same forces of change and decay as all other empires. The British must be able to recognize this, and to work to build a future that is better than the present. This requires a willingness to let go of the past, and to embrace the future. The British must also be able to work to build a more just and equitable society for all the peoples of the Empire.

The fifth of these is the fact that the British Empire is not a perfect entity. It is not without its faults and weaknesses. The British must be able to recognize these faults and weaknesses, and to work to improve them. This requires a willingness to listen to the criticisms of others, and to be open to change. The British must also be able to work to build a more just and equitable society for all the peoples of the Empire.

under Stain v. Meyers, 185 Ill. 189, and subsequent cases, it is invalid in that form.

It is the recognized rule of this state that where a conditional sale is made and the vendor retains the title in himself, but delivers the chattel to the vendee so as to clothe him with apparent ownership, the bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor. (Gilbert v. National Cash Register Co., 178 Ill. 288.) It is contended, however, by plaintiff in error that this rule will not obtain where the execution creditor is cognizant of the terms of the sale, and the contention here is that C. F. Williams, the father, knew or had reason to know, that the son did not have title to the piano. As the case must, in any event, be reversed, we need not discuss this question further than to say that the evidence is hardly sufficient to sustain the claim of such knowledge.

It is also the contention of plaintiff in error that said C. F. Williams does not stand in the relation of a bona fide purchaser because he should be deemed in law an attaching and not an execution creditor, and because he was the purchaser at his own execution sale. He had ceased to stand in the relation of an attaching creditor, and the rule that obtains with respect thereto does not apply to an execution creditor or a purchaser at execution sale. The authorities cited on the other proposition are merely to the effect that when the plaintiff in the judgment becomes the purchaser at the execution sale, he is chargeable with knowledge of irregularities and errors in the judgment and proceedings under the execution, a principle that has no application to the facts at bar.

It is also contended that where the judgment debtor has no title of any kind to personal property, the creditor cannot

acquire title by levy and sale under execution against such debtor. But this rule does not apply to bona fide purchasers or execution creditors, especially where the property comes into the hands of the debtor with the insidia of ownership. The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

304 - 19783

LEVITAN LUMBER COMPANY,
a corporation,
Defendant in Error,

vs.

MAX YEGENDORF et al.,
Plaintiffs in Error.

}
Error to
Municipal Court
of Chicago.

191 I.A. 454

MR. PRESIDING JUSTICE HARNES DELIVERED THE OPINION OF THE COURT.

The statement of claim filed by plaintiff below (defendant in error) was for "\$85.18, the current market price of lumber delivered to a building of the defendant, Max Yegendorf," for which it was alleged both he and one Balonik, his contractor, promised to pay. Yegendorf's affidavit of defense alleged the goods were not ordered or delivered to him but sold to Balonik, his contractor, and that he never so promised.

The record of the proceedings at the trial had before the court without a jury is designated as a "statement of facts," but is in the form of a statement of the evidence, certified by the court as all the evidence heard at the trial. We are asked by counsel for defendant in error to disregard it on the theory that we may infer from an examination of it that it does not contain all the evidence. We find nothing in it that justifies such an inference. In form it is a common law bill of exceptions and sets forth what purports to be the substance of all the material evidence. If anything material was omitted therefrom, it does not so appear, and defendant in error could by timely action have raised the question below and have secured a complete bill of exceptions, if this is not.

The record presents for our consideration nothing except whether the evidence was sufficient to support the court's

finding and judgment.

While plaintiff in error argues that if a promise was made it was invalid under the statute of frauds because not in writing, the question does not appear to have been raised below, and, therefore, will not be considered here.

Nor need we consider whether the proof was sufficient to establish an original promise. It was conflicting on that point. But the judgment must be reversed for the entire absence of any proof fixing the amount of liability if there was one.

There was no proof whatever of the quantity, quality or value of the lumber delivered. There was no contention that a price was agreed upon. The statement of claim itself is predicated upon a promise to pay for certain lumber at "the current market price" which there was no attempt to prove. It is unnecessary to say that such proof could not be supplied by merely showing the amount of the bill entered on plaintiff in error's books.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

E. A. THORPE,
Defendant in Error,
vs.
CAMERON-SCHROTH COMPANY,
a corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

191 I.A. 455

MR. PRESIDING JUSTICE FARNER DELIVERED THE OPINION OF THE COURT.

This was a suit for broker's commissions tried before the court without a jury. It is based upon the claim that plaintiff, Thorpe, was the procuring cause of a lease of certain space or rooms to one Reuter by defendant, Cameron-Schroth Company.

Both Thorpe and another real estate firm, J. J. Harrington & Co., were authorized to procure a tenant, and both presented Reuter's name to the defendant as a prospective tenant, the former by letter of January 7, 1913, and the latter by a letter dated January 2, 1913, each asking in his letter to be protected as to commissions in case a lease was effected. In a letter of January 8th, acknowledging receipt of Thorpe's letter, W. A. Cameron, the president of defendant, said, "We will protect you in this matter." About the middle of February, shortly after the deal was closed with Reuter through the firm of Harrington & Co., Cameron received a bill for commissions from Thorpe. Thereupon he wrote his agents, Harrington & Co., that in looking over his files he had found the correspondence with Thorpe above referred to and that he had overlooked it in negotiating with Harrington & Co. No special reference was made to the fact he had also overlooked the said letter previously received from Harrington & Co.

The court gave undue weight to these letters, saying at the close of the evidence, "These letters make out a case for plaintiff," thus evidently construing the promise of protection in

the letter to Thorpe as an unqualified promise to pay him the commissions in case of a lease to Reuter, regardless of whether he was the procuring cause of it or not, and perhaps the admission of Cameron that he had overlooked the letter containing such promise served to strengthen that view.

But the transaction and letter will bear no such construction, nor was plaintiff's statement of his cause of action framed on such theory, but rather on the theory of having earned the commissions by procuring a tenant.

The preponderance of the evidence, however, is against his contention. He appears to have seen Reuter only on one or two occasions, but did not follow the matter up, giving as an excuse therefor that he was induced to defer further efforts until defendant secured, as it planned, a new lease of the building. This, if true, does not justify his claim to commissions. But the record shows that Reuter was not induced to close the deal until considerable time after defendant had secured a new lease.

The record also shows by a clear preponderance of the evidence that not only were the effective negotiations and arrangements for the lease conducted by and carried on to completion through Harrington & Co., there being various conferences between their agent and Reuter, as well as with Cameron, respecting the various details of the deal,- the space to be taken, the division of it into rooms, the question of repairs, the amount of rental, etc.,- before the deal was actually concluded, but the record clearly shows that Reuter's attention was first drawn to the building by the agent for Harrington & Co., and some days before Thorpe endeavored to enlist his interest.

Thorpe could not justly claim commissions unless he was the procuring cause of the lease. The preponderance of the evidence shows he was not. He cannot on this record justly claim either to have been the first to submit the property to Reuter or

to have done any of the things which actually served to bring about the deal. On the contrary those things were done by another broker. Having put the matter in the hands of several brokers, defendant, in the absence of any specific agreement otherwise, was obligated to pay commissions only to the one that was the procuring cause of the lease. It paid them to Harrington & Co., and the record justifies its course. The judgment will be reversed.

REVERSED.

404 - 10808

FINDING OF FACT.

We find that the defendant in error, E. A. Thorpe, was not the procuring cause of a lease from plaintiffs in error, Cameron-Schroth Company, to G. A. Renter.

J. T. WILLIAMS and D. H. WILLIAMS,
doing business as WILLIAMS & COM-
PANY,

Appellees,

vs.

J. H. FLICK CONSTRUCTION COMPANY,
a corporation,

Appellant.

Appeal from
Municipal Court
of Chicago.

191 I.A. 467

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant, J. H. Flick Construction Company, having a contract for construction work with a railroad company, sublet certain portions of it to a firm, which, for brevity, we shall refer to as the Peterson Company, and the latter in turn sublet the work to appellees. Under the contract between appellant and said Peterson Company, entered into August 4, 1911, the work was to be finished by October 26, 1911. Appellees began work under their contract about September 7th. As it proceeded, appellant complained to appellees of the little progress made and appellees complained to appellant that the conditions under which they had undertaken the work had been changed and that they were incurring losses by reason thereof. The Peterson Company was to pay appellees 17¢ a yard for moving dirt and were to receive from appellant 19¢ a yard therefor. After several exchanges of complaints, as aforesaid, between the parties hereto, a conversation was had sometime in November between J. H. Flick, president of appellant, and J. T. Williams, one of appellees. Testifying to the matter, Williams claimed that his firm was about to abandon its contract with the Peterson Company and that to induce appellees to remain on the job, Flick said his company would make good their losses to the extent of the difference between what they and what the Peterson Company

Action by J. T. Williams and L. H. Williams
against J. T. Williams, Defendant
H. H. Cook Construction Company, Plaintiff
The sum of \$2268.00 claimed to be due under the
contract between the parties. The
sum of \$2268.00, Defendant's claim.

Conf. H. 1-2 in ~~Williams~~
Williams



The following table shows the results of the survey conducted in 1945 and 1946. The data indicates a significant decrease in the number of respondents over the two-year period. The reasons for this decline are not yet clear, but it may be related to changes in the population or the survey methodology.



were to be allowed for removing the dirt, namely 2½¢ a yard. Flick admitted that he made such an offer but claims that no arrangement therefor was consummated, and it appears that the contractual relations between the several parties remained unchanged; that appellees continued to work under their contract with Peterson Company, and while they were paid therefor by appellant, the payments were so made pursuant to the Peterson Company's order, and were based upon monthly estimates of the work done prepared by the railroad company's engineer. Flick claims that when he made such offer to J. T. Williams, the latter was to see his brother about it, and that on November 17th, about a week afterwards, they came to his office and resumed discussion of the subjects, but that there was no actual agreement made until December 28th; and this suit seems to be predicated upon an agreement made at that time. Appellees' statement of claim is as follows:

"Plaintiffs' claim is for \$700 for estimate for dirt work done in filling and grading, and \$1500 for the loss sustained under their oral contract entered into shortly prior to December 28, 1911, at which time plaintiffs and defendant agreed that the plaintiffs were sustaining loss by reason of the fact that the work to be done was not as represented and at which time plaintiffs and defendant also agreed on the sum of \$1500 as being the loss sustained by reason of misrepresentation of said work, which loss the defendant agreed to pay the plaintiffs and \$375.12 for ten per cent. of estimate held back and \$64 for curbing, making a total of \$2834.12."

At the trial the last item was eliminated and the actual amount of the first item was shown to be \$498. The verdict and judgment were for \$3382, evidently including the claim for losses, the amount held back and the actual sum of the December estimate, viz. \$498.

In its affidavit of merits, appellant specifically denied each and every allegation in said statement of claim, but Flick testified that in the conversation of December 28th, at which the parties to the several contracts were represented, appellees stated that their losses were \$1500, and that he said, "I will make you a proposition. I will give you \$1500. I will assume all your

estimates. You pull off the work. We will complete it ourselves"; and at the same time the representative of the Peterson Company agreed to give back to appellant the "margins" (or profits on its contract) that appellant had paid it. Explaining what he meant by assuming estimates, he said they were statements by the railroad company of the amount of work done by the contractor each month and that he meant that appellant "would take them and keep them."

While in its pleadings appellant practically denies making any contract at all, in its defense it virtually admits a liability to the extent of \$1500, a sum admittedly talked about on December 26th.

We shall take up the assigned errors in the order argued,- first, that the court erred in refusing to submit to the jury the question as to whether or not a valid contract had been made by the parties on December 26th.

Appellees relied entirely upon an oral agreement made December 26th, and appellant admitted that there was an agreement made at that time. The dispute was merely as to its terms, appellees claiming appellant agreed to pay \$1500 for their losses and in addition thereto the other specified items, and appellant claiming the \$1500 was in full settlement of everything. The question for the jury to determine, therefore, was not whether their minds met in an agreement, but what were the terms of the agreement made, as to which the parties had different recollections. But it does not follow because their recollections differed their minds did not meet. The contract being oral, it necessarily rested in their recollections and those of witnesses present when it was entered into, and we think the evidence relating thereto was such as to present for the jury's determination, not a dispute as to whether a contract was made, but what it was, both parties agreeing one was made. Hence, we do not think the court erred in refusing appellant's request to instruct the jury to the effect that there was no valid contract

unless the minds of the parties met. The instructions given covered the material points at issue. The jury were told in substance that they were to determine from the evidence what the agreement actually was, - whether the \$1500 was in full of all claims and demands between the parties, or whether such amount was merely to cover the losses; that if they believed the former, the verdict should be limited to that amount, but if they believed the latter and that the parties intended that in addition thereto appellees were to receive the December estimate and what was held back on previous estimates, their verdict should be accordingly.

To these instructions appellant took exception, claiming the jury were not permitted to find the entire issue in favor of defendant. As appellant practically admitted liability to the extent of \$1500, the only question left for the jury was whether appellant agreed to pay the other items, the amounts of which were not in dispute; and without any specific instructions that it was requisite to a contract that the minds of the parties should meet, the jury evidently so understood, for in reply to a special interrogatory as to whether D. H. Williams understood the proposition made to him by Flick in the conversation of December 28th the same as Flick understood it, they answered, "Yes."

Appellant next argues that there was error in the admission of evidence as to the manner in which appellees did their work, as to changes in conditions which resulted in their losses, and as to letters written and conversations had prior to December 28th. We shall not review these matters in detail. Many of them tended to explain the circumstances under which the parties met and entered into the agreement and to give verity to appellees' version of it. Some of the testimony was unnecessary to such considerations, but, after a careful review thereof, we do not think it was such as to prejudice or mislead the jury, for there was no contention on the part of appellees that appellant was liable for appellees' losses or for such estimates, except upon an express promise to

pay them, and the jury were so instructed. They must have understood the only purpose of the proof was to show that appellees actually incurred losses to the amount claimed; and in view of the dispute, the previous conversations and letters relating to the subject-matters under discussion at the time of the agreement tended to support appellees' version of the agreement.

Appellant next argues that the court erred in instructing the jury "that while the law requires that the minds of the parties shall meet in order to constitute a valid agreement, the law does not require that the parties shall afterwards remember or testify to the same thing in order to show such meeting of the minds," and also in instructing them, in substance, that if they believed the minds of the parties actually met in an agreement to pay plaintiffs \$1500 for the losses, the defendant could not thereafter avoid such agreement by stating, writing or testifying to a different state of facts, but the jury should take into consideration all the testimony and evidence in the case and determine from a preponderance thereof what the agreement between the parties actually was, and render their verdict accordingly. The error relied upon is in making special reference to the defendant. The instruction is not fortunately phrased, ^{but} it relates to the defense specifically made that the minds of the parties could not have met because Flick's testimony and recollections differed from that of plaintiffs. We do not think the concrete application thus made of the abstract proposition that one may not defeat his own contract simply by saying that he has a different recollection of its terms, should be regarded as reversible error.

Appellant's last contention is that in no event could there be a recovery on plaintiffs' evidence for more than \$1500. In support thereof reference is made to certain expressions by J. T. Williams in his testimony to the effect that on December 26th they were talking about nothing except losses. When the context in

which this testimony appears is closely examined, it does not appear to conflict with appellees' other evidence as to the agreement. In fact the jury may well have concluded from Flick's own testimony saying his firm would 'assume the estimates' and from his use of the same language in a letter written two days after the conference, that appellant was to pay appellees what the Peterson Company had to pay them on the estimates. Inasmuch as in said letter he recognized the obligation of appellant to pay the November estimate and subsequently paid it, it is a little difficult to accept his construction of the words 'assume the estimates.' His construction of the word "assume" is utterly at variance with its definition and use. Construing it as ordinarily used, we find support for appellees' version of the agreement. In view also of the fact that the Peterson Company was represented in the conference at which the agreement was made and agreed to surrender to appellant the margins or profits on its contract, there can be little doubt that appellant's promise to assume the estimates was a promise to pay appellees all that would be due thereon from the Peterson Company, and that such amounts were not included in the agreement to pay the \$1500. The evidence also tends to show that previous to the entry into such agreement, appellees were induced to continue the work upon an understanding or expectation that some such agreement would ultimately be made. We find no reversible error in the record and think the judgment should be affirmed.

AFFIRMED.

191/471
FEB 2 - 1915

373 - 20311

EDMOND GORMAN, Administrator of
the Estate of DAVID AIREY, decd.,
Appellee,

vs.

SOUTH SIDE ELEVATED RAILROAD
COMPANY,

Appellant.

} Appeal from
Superior Court,
Cook County.

1911A.471

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover damages on account of the death of David Airey, a boy sixteen years old, who was killed while a passenger on one of appellant's cars. The train was moving north on elevated tracks, which, near the place of the accident, turn from their northerly course east and then within one-half block suddenly curve again to the north. The boy was standing on the front platform of the second car and had been standing there for many blocks. The sides of the platform were enclosed by iron gates about six feet high. Along its front edge were four upright iron stanchions supporting the canopy, one standing in each corner and the other two between them. The space between the two in the middle was left open for passage from one car to another. From each corner stanchion to the next stanchion towards the middle was a railing about "waist high." The base of each stanchion was about 1½ inches from the platform. At the time of the accident the boy stood near the left corner stanchion and railing, fronting towards the rear platform of the first car which was like the other in construction.

As the train moved around the curves, the relative position of adjoining platforms was, of course, almost constantly changing. As the first curve was taken, the left corner of said rear platform necessarily swung away from the car behind, and, as

the next curve was taken, the other corner swung away, bringing said left corner back by a sudden, jerky and irregular movement, in the course of which the west corner stanchions came within five inches of each other. During that movement the boy's head was caught and crushed between these two stanchions.

The case was submitted to the jury on two counts of the declaration, the first charging the defendant with negligence in failing to give Airey any notice or warning of the danger of his position under such circumstances, and the second charging negligence in failure to provide a guard or device so as to protect passengers while thus standing on the platform. There was some variance in the testimony of the witnesses as to the exact position of the boy at the time of the accident, but in the main the evidence tended to show that he stood leaning against the stanchion with one foot pushed through openings of the railing just above the platform.

The amount of the judgment was \$2,000. Appellant asks for reversal on three grounds,- (1) that there should have been a directed verdict for defendant; (2) that deceased was guilty of contributory negligence, and (3) error in modifying and refusing instructions.

The first ground is based upon the claim that the proof was insufficient to show negligence as charged in the first count and that defendant was under no legal obligation as charged in the second count so to enclose its car platform as to prevent deceased from assuming the position in which he was injured. As to the last claim, it is sufficient to say that whether such a duty existed was, we think, a question for the jury. It was so held in a case where the question arose whether it was the duty of the common carrier to provide guards at windows to prevent passengers from extending their arms outside, the court saying, "If the defendant chose to operate its cars so close together as to be dangerous for passengers, it was a fair question for the jury whether it ought to

have provided screens, netting or bars, or some other appliance, to prevent injuries." (Pell v. J. P. & A. R. R. Co., 238 Ill. 510.)

.. That there was danger to deceased while standing close to the front rail of the platform near the corner stanchion when the train was making such a curve, if his head was even slightly projected over the railing, is apparent from the circumstances above stated. Such danger might not be known or apparent to one who had never observed how near the stanchions come together in such movement, but the company was chargeable with knowledge of the fact and the consequent danger, and if it permitted passengers to ride on its platform where they might be exposed to such danger, we think its duty of exercising the highest degree of care consistent with such means of transportation and practical operation of the road required it to give notice or warning of such danger. But no such warning or notice was given. One of the company's guards was present and knew that the deceased and other passengers were on the platform, and might be exposed to a danger of which they might not be aware, and in the absence of anything to give them notice of it whether he should not have warned them was a question for submission to the jury. The court properly refused to direct a verdict.

Whether there was contributory negligence was a question of fact and not of law. Appellant relies on testimony tending to show that the deceased was looking downward into the street and that the stanchions caught his head back of the ears, thus indicating, as claimed, that he had pushed his head forward and in front of or around the stanchion. The testimony relied on was by no means conclusive, and the entire evidence was such as to require the jury to determine therefrom what his actual position was, and whether he was guilty of contributory negligence in taking it. After a full examination of the evidence, we are not disposed to disturb their finding. In arguing that contributory negligence

was a question of law, appellant cites authorities from other jurisdictions, at variance with those in our own state with respect to similar facts. (See the Pell case supra; also Peterson v. E. A. & S. Trac. Co., 238 id. 403.)

As to the instructions complained of, the court modified one and refused two that were defective in that they were predicated upon the wrong theory of the first count of the declaration. They limited the jury's consideration of the question of appellant's duty to warn and give notice of the danger to what was required of the guard in that respect. The declaration contained no specific allegation with reference to his negligence. It was broader in its charge of negligence and breach of duty, and therefore the instructions, as presented, were likely to mislead the jury by such limitation. We do not think there was reversible error in the case.

AFFIRMED.



20393
304 - 20321

JOHN D. CASBY, Adm., of the
Estate of PATRICK TRACY, De-
ceased,

Appellee,
vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

Superior Court,
Cook County.

191 I.A. 474

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$4,000 recovered by appellee in an action brought against appellant on account of the death of appellee's intestate, Patrick Tracy, who, while crossing a street, was struck and killed by one of appellant's cars.

The grounds of negligence charged are that the car was run at a street crossing (1) at a high and dangerous rate of speed, (2) without ringing a bell or sounding a gong, and (3) without properly looking out for pedestrians who might be crossing the street. There was no evidence in support of the last stated ground except what related to the other charges.

Tracy was going west on 50th street, the car south on State street in Chicago. He came in contact with the extreme southeast corner of said southbound car just as he stepped from behind a northbound car standing on a parallel track on the north side of 50th street. At that time the car stopped after instead of before crossing the street.

The accident happened just after dark, but there were lights in the cars and along the street. Plaintiff's only witness to the accident was Mrs. Ward, a woman who at the time was about an "arm's length" behind Tracy and four or five feet back of the northbound car, midway between its tracks. Testifying on the part for defendant were the conductor and four witnesses who saw



The following text is a transcription of the handwritten notes accompanying the diagram. It describes the operation and components of the pump or engine component shown in the diagram above.

The diagram shows a pump or engine component. The main part is a vertical shaft. A curved arm or lever is attached to the side of this shaft. The arm is connected to a pump or engine component. The shaft is driven by a motor or engine. The arm moves up and down as the shaft rotates. This movement is used to pump or move fluid. The diagram is labeled with various parts and includes a title at the top right.

The title is "Diagram of a Pump or Engine Component". The main part of the diagram is a vertical shaft. A curved arm or lever is attached to the side of this shaft. The arm is connected to a pump or engine component. The shaft is driven by a motor or engine. The arm moves up and down as the shaft rotates. This movement is used to pump or move fluid. The diagram is labeled with various parts and includes a title at the top right.

The labels in the diagram include "Pump or Engine Component" at the top right, "Shaft" near the central vertical part, and "Arm or Lever" near the curved part. There are also some smaller labels and numbers scattered around the diagram, possibly indicating dimensions or specific parts.

the accident, - the motorman, two passengers standing in the front vestibule of the car, and a pedestrian walking north on the west side of State street.

As to speed, Mrs. Ward testified that the car "was going in a hurry," "was going fast"; but neither expression, as said in Roberts v. Chicago City Railway Co., 282 Ill. 308, conveys any definite idea "when not stated in comparison with the ordinary rate of speed or some definite standard." But such testimony has even less value when considered in connection with her opportunity to form any definite idea. In her position behind the northbound car, she necessarily saw the movement of the approaching car for only a few feet and for a comparatively short time before it struck deceased. She could not remember how much of it she saw during the interval of its coming in sight and striking him. But defendant's witnesses had a much better opportunity to judge of the speed. Four of them were on the car and one in a position on the street to see the car as it approached and made the crossing. The latter described the speed as "medium speed," the motorman as five miles an hour, one of the passengers as "half speed" and the other and the conductor said the car was slowing down as it approached the crossing. The conductor testified to giving a signal before reaching 30th street for a stop on the south side of it, and the motorman to shutting off the power and "coasting" after receiving the signal and to applying the emergency brake as soon as Tracy came into his view. The car stopped within 30 to 35 feet from the point of collision, about the distance, as testified to by the motorman, in which a car running five miles an hour can be stopped by the emergency brake. This circumstance supports defendant's evidence as to the speed and that the car was slowing down as it approached the crossing, and is far more convincing evidence on the subject than the mere opinion of Mrs. Ward formed under unfavorable circumstances. The only evidence

besides her indefinite statements relied upon by plaintiff to show a high or dangerous rate of speed was the equally indefinite testimony that if the car made the distance it was to run on schedule time, its average speed would be nearer eighteen miles an hour. But this evidence is to our mind of little value in view of the positive and convincing evidence that the car was slowing down preparatory to stopping at the crossing. Not only, therefore, is the preponderance of the evidence against the contention that the car was running at a high and dangerous rate of speed, but there is very slight, if any, evidence that legitimately tends to support it.

As to the ringing of the bell, plaintiff's witness testified that none was rung. On the contrary, the testimony of defendant's five witnesses tends strongly to show not only that the bell was rung preparatory to stopping on the opposite side of the street, but continued to ring while passing the other car, and that the emergency ring was given as soon as Tracy could be seen and rung so loudly as to attract the attention of the witness on the street and cause him to shout a warning before deceased was hit. On this question also, we think, the evidence which we need not set out in detail greatly preponderates against plaintiff's contention that no bell was rung.

But not only does the evidence preponderate against the plaintiff on the question of defendant's negligence, but on the question of exercise of due care by deceased.

It appears that Tracy and plaintiff's witness, Mrs. Ward, stood close to the track while the northbound car passed and came to a stop, and then passed behind it, Tracy being a little ahead. If the latter looked at all to see whether a car was approaching on the tracks he was about to cross, it was then it was too late. The distance between the bodies of the two cars as they



passed each other was about twelve or fourteen inches. From the northbound tracks, therefore, he had only one or two steps to take to be in danger. Living in Chicago, he must have been familiar with the conditions from which such danger is apparent.

There is some doubt whether the northbound car had started up before the collision. If it had, then he had a better opportunity to see the approaching car. If it had not, then, standing on the inside rail of the northbound track, four feet back of the northbound car, about the position in which plaintiff's only witness puts him when she first saw the approaching car, he could, as shown by demonstrative evidence, have seen one-half of the front of the car 43 feet away, and she, midway between the northbound tracks, could have seen that much of the car 17-3/4 feet away. He was bound to know that only one or two steps lay between him and the point of danger in case a car was about to pass, that cars were frequently passing, that he could step more quickly than the car, however slowly it might be going, and that a motorcar could not see him before he would see the car. The evidence tends to show that he moved on in evident disregard of any danger until almost the moment of collision, when, in his confusion, he made a lunge to cross ahead of the car. The real question is whether under such circumstances he was excused from looking, and he apparently did not look until too late.

Appellant urges that the question of contributory negligence in such circumstances is one of law and cites the recent decision in the Roberts case, supra, and several decisions of this court and from other states.

The Roberts case may be differentiated from this in that there the party killed attempted to cross a street between two approaching cars when both were in plain view. But in none of the other cases cited, where injury or death resulted from passing behind one car and in front of one moving in an opposite

The first part of the paper is devoted to a discussion of the various
 methods which have been proposed for the determination of the
 concentration of a substance in a mixture. The methods are divided
 into two classes: those which are based on the measurement of the
 physical properties of the mixture, and those which are based on the
 measurement of the chemical properties of the mixture. The first class
 includes the methods of gravimetry, volumetry, and titrimetry. The
 second class includes the methods of colorimetry, spectrophotometry,
 and fluorescence. The methods of gravimetry and volumetry are the
 most accurate, but they are also the most tedious. The methods of
 titrimetry, colorimetry, spectrophotometry, and fluorescence are the
 most rapid, but they are also the least accurate. The choice of method
 depends on the nature of the substance and the nature of the mixture.
 In this paper, we shall discuss the methods of gravimetry, volumetry,
 and titrimetry. The methods of colorimetry, spectrophotometry, and
 fluorescence will be discussed in a later paper.

direction on an adjacent parallel track, the test usually applied was whether the conditions and circumstances were such as would excuse the failure to look, and, when not so regarded, this court has reversed the judgment with a finding of facts.

In Ohnsorge v. Chicago City Railway Co., 177 Ill. App. 134 (affirmed in 258 Ill. 434), we said, "In our opinion a person passing behind one car and in front of another at a street crossing owes the duty to look before stepping on a parallel track, and that failure to do so is contributory negligence," and we there cited the following cases presenting a similar state of facts: Burke v. Chicago City Ry. Co., 153 id. 306; Von Holland v. Chicago City Ry. Co., 148 id. 300; Brown v. Chicago City Ry. Co., 155 id. 434. To these cases may be added Healy, Admr., v. Chicago City Ry. Co., 167 id. 524, and Binder v. Chicago City Ry. Co., 175 id. 503. In each of the cases so cited injury or death resulted at a street crossing to one passing behind one car and in front of another moving on a parallel track in the opposite direction. In some of them the party knew the car was approaching, in others he did not, but failed to look at all or in due time. In each the judgment was reversed without remanding the cause for a new trial. We are unable to differentiate this case from them in principle or as to the material facts. Whether or not the failure of deceased to look in the direction from which the car was approaching as he emerged from behind the northbound car was negligence per se in law, it certainly was, under the circumstances disclosed by the record, negligence in fact. It was useless to look when the danger could not be averted, and we find nothing in the circumstances that excused deceased from looking, especially after he got to a point where the approaching car was visible and safety was still possible. It would have been negligence to assume that because the car he was passing obstructed his vision towards the north a car would not be coming from that direction; and even though a gong was not sounded, we question whether, in view of the

fact with which he was familiar that cars were likely to pass any time, one in such a position would be excused in relying solely upon his hearing. However, the preponderance of evidence shows that the gong was duly sounded. We think there was a complete failure to prove the exercise of due care by deceased for his own safety as alleged in the declaration. The judgment will be reversed with a finding of fact incorporated in the judgment of this court.

REVERSED WITH A FINDING
OF FACT.

MEMORANDUM

TO : THE SECRETARY OF THE ARMY
FROM : THE CHIEF OF THE ARMY
SUBJECT: [Illegible]
[Illegible text follows, appearing to be a memorandum of discussion or decision.]

[The remainder of the page contains several paragraphs of text that are extremely faint and illegible. The text appears to be a formal report or memorandum, possibly detailing military operations, personnel matters, or administrative decisions. The structure suggests a header section followed by a main body of text.]

384 - 20323

FINDING OF FACT.

We find that appellee's intestate, Patrick Tracy, was guilty of negligence which contributed to his injury and death.

HERMINE RICHTER,
Plaintiff in Error,
vs.
VILLAGE OF MAYWOOD,
Defendant in Error.

Error to
Circuit Court,
Cook County.

191 I.A. 475

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Hermine Richter, a woman about 55 years of age, brought an action in the Circuit Court of Cook County, on July 28, 1910, against the Village of Maywood and John W. Barker, defendants, to recover damages for personal injuries sustained in consequence of her stepping into an unguarded hole or excavation at the street crossing at the southeast corner of Tenth avenue and Sixth street in said village on April 27, 1910, about 8:30 o'clock in the evening. On June 17, 1910, she caused to be served on the Village a written notice, in compliance with the statute, in which it was stated that she was injured at said time "by reason of the defective and unsafe condition of the sidewalk and street at or near the southeast corner of the intersection" of said street. The declaration consisted of three counts. The first count alleged in substance that the Village maintained and controlled said streets and allowed the defendant, John W. Barker, to tear up and excavate said streets at or near their intersection; that on April 27, 1910, plaintiff, while a pedestrian and in the exercise of due care for her own safety, fell into a certain hole or excavation, of which the Village had knowledge or in the exercise of reasonable care could have had knowledge, and which hole or excavation was located at or near the intersection of said streets; and that because of said fall, occasioned by the negligence of the Village, she sprained and dislocated her leg, and her spine was injured, and she suffered permanent injuries, etc. The second count charged

that the Village negligently permitted said hole or excavation "to remain in an ungaurdian condition." The third count alleged that the Village negligently allowed said hole or excavation to be there "without placing any warning of any kind" on or near the place. The Village filed a plea of the general issue. The cause was tried before a jury. During the trial the well was disclaimed as to the defendant, John W. Barker. The jury returned a verdict finding the Village not guilty. Judgment was entered on the verdict, January 27, 1911, which judgment the plaintiff by this writ of error seeks to reverse.

Tenth Avenue is a north and south street, and Fifth street is an east and west street, intersecting Tenth Avenue at right angles. Plaintiff testified in substance that she lived at No. 212 Sixth street, which is on the south side of the street about 20 feet east of the place where she was injured; that on the evening in question she was calling at the home of Mrs. Caythe, who resided on the west side of Tenth Avenue, north of Fifth street, which latter street is the first street north of Sixth street; that she left Mrs. Caythe's house for her own home, crossed Tenth Avenue at Fifth street and then walked south on the east side of Tenth Avenue, reached Sixth street, and had nearly crossed over that street when her foot went down into a hole and she fell between the curbstone and the sidewalk; that she hurt her head, leg and back; that it was dark and that there was no light or lantern at or near the place where she fell, and that she afterwards suffered much pain and was confined to her bed for five weeks as the result of her fall. The testimony of certain witnesses for the plaintiff was to the effect that, at the time of the accident, there were excavations at the southeast corner of the intersection of said streets; that new cement curbing had just been put in, which curbing was about 15 feet from the south sidewalk of Fifth street, there being a pathway between the curbing and the sidewalk;

The first of these is the fact that the
 government has been unable to secure
 a satisfactory arrangement for the
 disposal of the surplus. It has been
 found that the surplus is not
 sufficient to meet the needs of the
 government, and it is necessary to
 raise additional funds. This has been
 done by the issue of new bonds,
 and the government has been able to
 meet its obligations. The second
 point is that the government has
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 arrangement for the disposal of the
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 surplus is not sufficient to meet the
 needs of the government, and it is
 necessary to raise additional funds.
 This has been done by the issue of
 new bonds, and the government has
 been able to meet its obligations.

were that there/excavations on both sides of the curbing; that dirt had been "piled up on the top of the curbing in order to prevent people from going into the cement"; that "between the curb and the sidewalk was a hole about 18 inches deep" and that this hole was there for about two weeks prior to April 27, 1910. John W. Barber, a witness for the Village, testified that he had the contract with the Village for the paving and the curbing; that he started on the work on April 2nd; that on the morning of April 28th he went and viewed said southeast corner because he had heard that Mrs. Richter had been injured; that he found "the curb and gutter filled over with earth excavated from the trench," but that he found no holes or depressions.

Inasmuch as we have reached the conclusion that the judgment must be reversed and the cause remanded for a new trial on account of errors in the instructions, we will not further relate, or comment upon, the evidence. Seven instructions offered by the plaintiff were given by the court. In two of these instructions the jury were instructed on the subject of the degree of care required on plaintiff's part at and before the accident, and what was meant by the terms "ordinary care" and "reasonable care." Yet the court, among the twelve other given instructions offered by the Village, also gave eight instructions which directed the jury's attention to the degree of care required on the part of plaintiff, and five of these eight were instructions which directed a verdict for the Village. Some of these instructions were argumentative and misleading, and on this account erroneous, and two of them did not contain all the elements that would justify a verdict of not guilty under the facts in evidence. Furthermore, we think that the giving of so many instructions as to the degree of care required by plaintiff, unduly emphasized plaintiff's duty in this regard (Chicago & Eastern Illinois R. Co. v. Conine, 312 Ill. 389, 375), and tended to create in the minds of the jury the impression that the court did not believe that plaintiff was in the exer-

list of the date at the time she was injured.

The judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

117 - 17500

CARRIE EILLIAN, Administratrix
of the Estate of Josephine Novak,
deceased,

Defendant in Error,

vs.

VACLAV TESAR,

Plaintiff in Error.

Free to
Municipal Court
of Chicago.

191 I.A. 476

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Vaclav Tesar, defendant below, seeks by this writ of error to reverse a judgment of the Municipal Court of Chicago for \$638 rendered against him in favor of Carrie Eillian, administratrix of the estate of Josephine Novak, deceased.

Josephine Novak died in the year 1891, and letters of administration were issued to plaintiff on September 7, 1912, and on September 13, 1912, this action was commenced. Plaintiff in her amended statement of claim alleges that her claim is for a balance due, in principal and interest, on a certain promissory note for \$400 signed by defendant in the year 1890, payable two years after date to the order of said Josephine Novak, and "that a part payment of \$150 was made by defendant in 1905, and a new written promise to pay, dated June 28, 1912, was made by defendant to plaintiff." A copy of the note and of the alleged new written promise are set out in the statement of claim. It is to be noticed that plaintiff does not allege that the said part payment of \$150 was made by defendant on the note, and, also, that in said alleged new written promise no mention is made therein of said note, which note and alleged written promise are as follows:

"\$400.

Chicago, April 6, 1890.

Two years after date we promise to pay to the order of Josephine Novak four hundred dollars at six per cent per annum.
Value received.

Due April 6, 1902.

Vaclav Tesar."

- 1 -

"June 28, 1912.

Dear Niece:

I am very sorry but I cannot give you any money just now, as I had taxes to pay and the street. Just as soon as I can I will settle with you.

V. Tesar."

The defendant in his affidavit of merits alleged in substance that he had paid all sums due and owing from him to said estate, that he does not owe plaintiff anything, and further that plaintiff is barred from any recovery in that defendant "at no time promised in writing or otherwise to pay any money or any sum whatever upon said note."

The case was tried before the court without a jury. Plaintiff called defendant as a witness and the latter admitted that the signature on the note was his signature, and the note was admitted in evidence. The original note is in the record before us and no endorsements appear on the back thereof. To meet the objection that a recovery on the note was barred by the statute of limitations, plaintiff testified that she first saw the note in question in the year 1910 in the hands of her sister, Mrs. Pauline Bangert, at which time at her request Mrs. Bangert turned the note over to her; that defendant was her uncle; and that on June 10, 1912, she wrote and personally mailed to the defendant a letter, of which she kept a copy. Defendant was asked to produce the original letter, and upon his attorney's statement that no such letter had been received by defendant, the alleged copy was admitted in evidence. This copy is dated "Chicago, June 10, 1912," and is addressed to "J. Tesar; Dear Uncle." It is in pencil, and several words appear to have been erased and interlineations made, and it appears to be in substance a demand for the payment of "some of the intrust of my parents' money." Plaintiff further testified that following the writing of said letter she received the letter, dated June 28, 1912. This letter was written in long hand. Although plaintiff testified that she was not familiar with the handwriting of defendant, and was unable to say

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that either the handwriting in the body of the letter, or the signature, was that of defendant, the court, over objection, admitted the letter in evidence. The defendant testified that he did not receive the letter from plaintiff of June 18th, or any letter like the copy introduced; that he did not write or sign said letter of June 28, 1912; that the same was not his letter; and that beyond being able to sign his name and write a word or two, such as "paid," he could not write in the English language.

Frank Tesar, called as a witness for plaintiff, testified that he was a cousin of plaintiff and Mrs. Bangert, and a nephew of defendant; that his father, Frank Tesar, brother of defendant, died intestate in Kenosha, Wisconsin, in 1903; and that after his father's death he found the note in question among his father's papers and that he kept it until the year 1907 or 1908, when, at the request of Mrs. Bangert, he turned it over to her. He was shown the letter of June 18th, purporting to be signed by defendant, but was unable to say positively that the signature thereto was that of defendant.

It further appears from the evidence that when Josephine Novak died in 1891, she left surviving the plaintiff, another daughter afterwards Mrs. Bangert, and two other daughters, and that all four were raised and educated by their uncle - the elder Frank Tesar. Plaintiff testified that she received certain payments in money from the wife or daughter of defendant, made on defendant's behalf, aggregating \$200, during the year 1906 and the early part of the year 1908. Mrs. Bangert testified that she received certain payments from the wife or daughter of defendant aggregating \$100, - the first payment being made in 1900 and the last payment in 1903, and that the two other daughters of Josephine Novak each received payments aggregating \$150. These payments amount in all to \$600. They were all made before Frank Tesar, at the request of Mrs. Bangert, turned over the note in question to Mrs. Bangert. Both plaintiff and Mrs. Bangert testified that they

never discussed the note with defendant, and that they never got any money from defendant personally.

We have reached the conclusion, after carefully examining the record before us, that the evidence does not show that defendant made any payment on said note within ten years prior to the commencement of this action, September 13, 1912, or that defendant, either on June 25, 1912, or, at any time within ten years prior to the commencement of this action, made any new written promise to pay anything on said note to plaintiff, or any one else, and that the trial court erred in entering the present judgment. We think the trial court should have entered judgment in favor of defendant.

The judgment of the Municipal Court is therefore reversed, but the cause is not remanded.

JUDGMENT REVERSED.

Finding of Facts: We find that the defendant, Vasilav Todor, did not within ten years prior to the commencement of the present action make any payment on the note sued upon, and did not within said time make any new written promise to pay anything on said note, or to pay said note, to plaintiff or any one else.

EDWARD LEVY,
 Defendant in Error,
 vs.
 C. O. F. BURKSTROM,
 Plaintiff in Error.

Error to
 Municipal Court
 of Chicago.

1911 A. 478

STATEMENT OF THE CASE. The defendant, C. O. F. Burkstrom, seeks by this writ to reverse a judgment of the Municipal Court of Chicago, rendered against him, June 7, 1913, in favor of Edward Levy, plaintiff, for \$25, which sum plaintiff claimed was due him as rent under a written lease.

By said lease, dated February 24, 1910, plaintiff leased to defendant the dwelling house, known as 1440 North Clark street, Chicago, for the term from May 1, 1910, to April 30, 1911, at a rental of \$600, payable in installments of \$50 on the first day of each and every month during the term. The lease contained a clause by which the defendant authorized any attorney of any court of record to appear for him, upon complaint made, and confess judgment from time to time for the amount of any rent that might be due plaintiff together with \$20 attorney's fees. The seventh clause provided that if defendant should abandon or vacate the premises, the lease should be re-let by plaintiff for such rent and upon such terms as plaintiff saw fit, and that if a sufficient sum should not be thus realized, after paying the expense of such re-letting and collecting, to satisfy the rent reserved, defendant agreed to satisfy and pay all deficiency.

Defendant resided on the premises, and paid all rent due, up to September 30, 1910, when he moved out.

On October 3, 1910, plaintiff caused a judgment by confession upon said lease to be entered in the Municipal Court against defendant for \$70, viz: for the rent due and payable Octo-

ber 1st, \$50, and \$20 attorney's fees. Defendant subsequently moved that the judgment be vacated and set aside, but the court after a hearing on the motion denied the same, and subsequently, on February 23, 1911, said judgment for \$70 was paid and satisfied in full.

On November 29, 1910, plaintiff commenced an action against defendant to recover the sum of \$40 damages "caused by the defendant to plaintiff's premises," in consequence of defendant removing therefrom certain shades, gas pipes and other piping. This case was tried before a jury and on April 20, 1911, they returned a verdict finding the issues for the plaintiff and assessing plaintiff's damages at the sum of \$5, upon which verdict judgment for \$5 was entered against defendant and subsequently satisfied.

On December 1, 1910, the suit now before us was commenced. On that date plaintiff caused a judgment by confession upon said lease to be entered in the Municipal Court against defendant for \$45, viz: for the rent due "for one-half of the month of November, 1910," \$25, and \$20 attorney's fees. Defendant moved that said judgment be vacated and set aside, and after a hearing the court, on February 11, 1911, entered an order overruling the motion. This order was reversed by another branch of this appellate court, and the cause was remanded (174 Ill. App. 376), and in December, 1912, reinstated in the Municipal Court. On January 17, 1913, it was ordered that defendant's affidavit to vacate the judgment stand as his affidavit of merits in the cause, and on March 17, 1913, defendant filed an amended affidavit of merits. It was therein alleged in substance (1) that defendant removed from and surrendered the premises on September 30, 1910, under the verbal agreement between the parties that defendant was to be released from the payment of further rent in consideration of his removal, and (2) that plaintiff by written lease had re-rented the premises

and the fact that the Government has not been able to obtain the necessary information to enable it to make a proper assessment of the situation in the country. The Government has not been able to obtain the necessary information to enable it to make a proper assessment of the situation in the country.

On January 11, 1941, the Government has not been able to obtain the necessary information to enable it to make a proper assessment of the situation in the country. The Government has not been able to obtain the necessary information to enable it to make a proper assessment of the situation in the country.

On January 11, 1941, the Government has not been able to obtain the necessary information to enable it to make a proper assessment of the situation in the country. The Government has not been able to obtain the necessary information to enable it to make a proper assessment of the situation in the country.

to one George Lewis for a term beginning November 1, 1910, and expiring April 30, 1914, at a monthly rental of \$50 per month up to April 30, 1911, and \$65 per month thereafter.

The cause was tried before the court without a jury, resulting in the court finding the issues against defendant and assessing plaintiff's damages at \$25, upon which finding judgment against defendant was entered. The court refused to include the \$20 attorney's fees in the judgment. No cross-errors have been assigned by plaintiff.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

After a review of the evidence we are of the opinion that it was not shown by a preponderance of the evidence that when defendant vacated the premises, on September 30, 1910, he did so under a verbal agreement between the parties that he was to be released from the obligations of the lease, or that he surrendered the premises and that plaintiff accepted that surrender. On the contrary, we think the evidence shows that he abandoned the premises. Under such circumstances it was the right and duty of plaintiff, as lessor, to take charge of the premises, and, if possible, re-rent them, and thus reduce the amount for which the defendant, as lessee, was liable. (West Side Auction Co. v. Connecticut Ins. Co., 186 Ill. 156.)

The evidence further discloses that on or about November 1, 1910, plaintiff, by written lease, rented the premises to one George Lewis for a period from November 1, 1910, to April 30, 1914; that Lewis was to pay plaintiff \$25 as rent for the month of November, 1910, \$50 for the month of December, 1910, and \$50 per month thereafter until April 30, 1911 (which was the date when the term of the former lease to defendant expired); and that plain-

tiff received from Lewis \$75 as rent for the months of November and December, 1910, and \$50 per month thereafter until April 30, 1911. It thus appears that plaintiff did not receive as rent for the month of November, 1910, all that defendant had agreed to pay for that month, but \$25 less than that amount, and the evidence further discloses that, owing to the condition in which defendant left the premises when he vacated them which necessitated certain repairs and cleaning, it was not the plaintiff's fault that he could not, or did not, obtain from Lewis, the new tenant, the sum of \$50 as rent for said month of November. We do not think that under all the evidence the defendant was relieved from liability to pay plaintiff so much of the November rent as plaintiff did not get from Lewis. (Huginton, Keeling Co. v. Wheeler, 173 Ill. 514, Marshall v. Grosse Clothing Co., 184 Ill. 431.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

HENRY F. NORCOTT, doing business
as H. F. NORCOTT & CO.,
Defendant in Error,

vs.

MARY S. FRANKENBURGER,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

191 I.A. 480

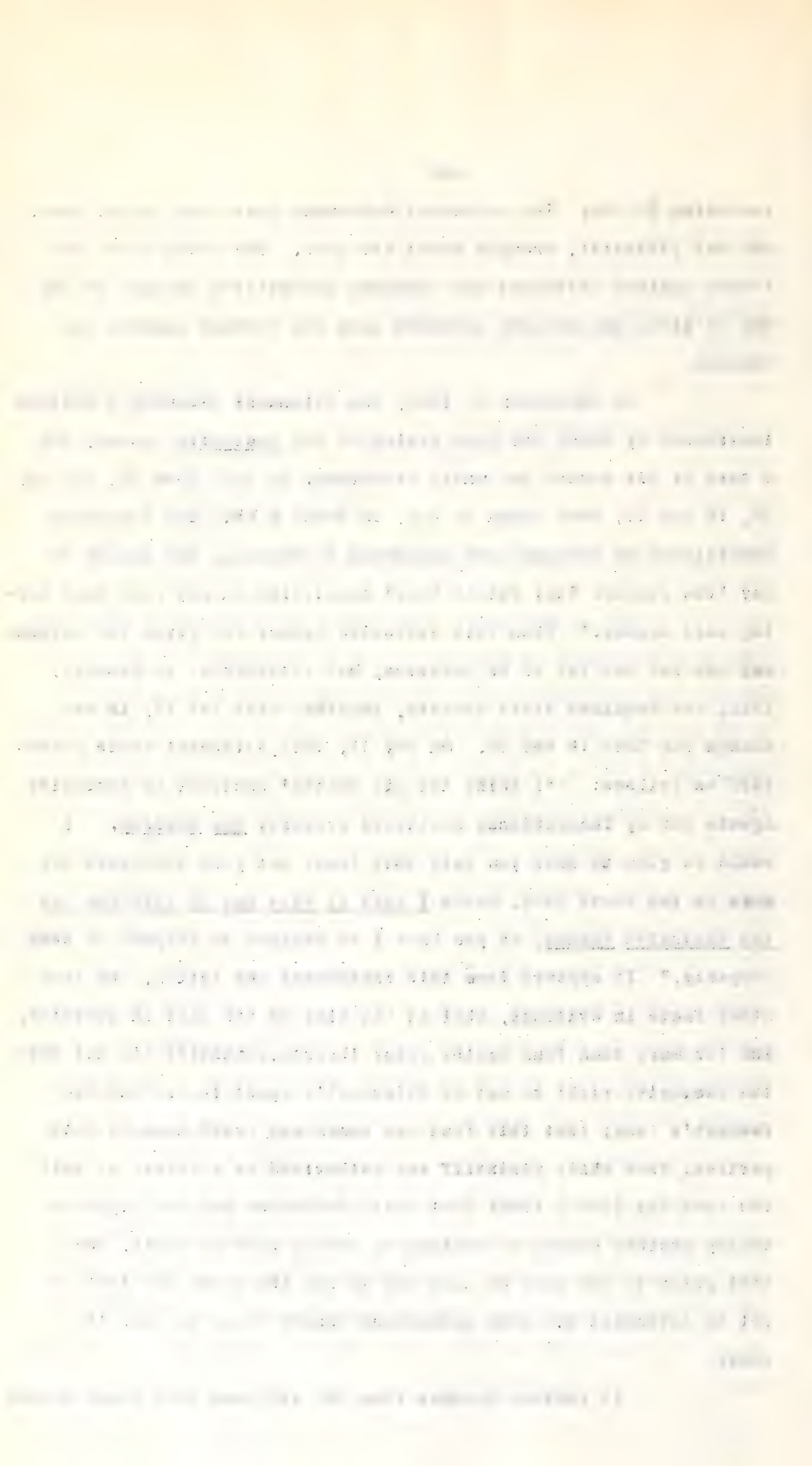
MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 26, 1913, Henry F. Norcott, a licensed real estate broker in Chicago, filed an affidavit in attachment in the Municipal Court of Chicago in which he alleged that Mary S. Frankenger, defendant, residing in Milwaukee, Wisconsin, was indebted to him for commissions for obtaining a purchaser for lot 18 and the south six feet of lot 15 on Independence Boulevard in said city of Chicago. The defendant filed her appearance and entered into a recognizance, and the attachment was dissolved. In her affidavit of merits the defendant alleged that the plaintiff did not obtain a purchaser for said property. On the trial of the case, before the court without a jury, it appeared that defendant, on September 24, 1913, entered into a written contract with E. Balsam whereby the latter agreed to purchase, and the defendant agreed to sell, the property for \$3,000. The contract provided for the payment by defendant to Schiff Bros., the vendor's brokers, of a commission of 5 per cent. on the selling price for their services in procuring the contract. The plaintiff contended that he was the procuring cause of said sale and was entitled to recover of the defendant the sum of \$120, which was the usual and customary charge for commissions in the city of Chicago, and in accordance with the rates of the Chicago Real Estate Board of which he was a member, for making a sale of real estate for over \$2,000 and up and

including \$3,000. The defendant contended that said Schiff Bros., and not plaintiff, brought about the sale. The court found the issues against defendant and assessed plaintiff's damages at the sum of \$120, and entered judgment upon the verdict against defendant.

On September 5, 1912, the defendant executed a written instrument by which she gave plaintiff the exclusive agency, for a term of six months and until withdrawn, to sell lots 12, 13, 14, 15, 16 and 19, then owned by her, in Vance & Phillips Boulevard Subdivision on Independence Boulevard in Chicago, and agreed to pay "the regular Real Estate Board commission on any sale made during said agency." When this exclusive agency was given the defendant did not own lot 16 in question, but afterwards, in January, 1913, she acquired title thereto, together with lot 17, in exchange for lots 18 and 19. On May 13, 1913, defendant wrote plaintiff as follows: "I think the six months' contract as exclusive agents for my Independence boulevard property has expired. I would be glad to have you sell this land, but your interests are more on the South Side, hence I feel it wise not to give any one the exclusive agency, as you know I am anxious to dispose of this property." It appears from this instrument and letter, and from other facts in evidence, that at the time of the sale in question, and for more than four months prior thereto, plaintiff did not have the exclusive right to act as defendant's agent in selling defendant's land; that this fact was known and acted upon by both parties; that while plaintiff was authorized as a broker to sell the land for \$100 a front foot still defendant had the right to employ another broker or brokers to make a sale or sales; and that prior to the sale of said lot 16 and the south six feet of lot 15 defendant had also authorized Schiff Bros. to sell the same.

It further appears from the evidence that about August



6, 1913, plaintiff consummated a sale for defendant to one Weinstein of lot 12 and the north 30 feet of lot 13 in said subdivision; that about this time plaintiff was also negotiating, through another broker, Joseph Blaha, with Mr. and Mrs. Balsam for the sale of said lot 12 and the said portion of lot 13, which together had a frontage of 30 feet; that plaintiff told Blaha to ask \$110 per foot for the same, which he did, but that the Balsams refused to buy the land at this price and no deal was consummated with the Balsams by either plaintiff or Blaha; and that subsequently the contract of September 24, 1913, was executed through the efforts of Schiff Bros. The attorney for defendant in Chicago testified that on the day the contract was signed, and before it was signed, he called up plaintiff's office over the telephone and was told by E. J. Norcott, brother of plaintiff and associated with plaintiff in business, that plaintiff was not making any great effort to sell the south 30 feet (which is the land in question) but that plaintiff had negotiations on for the sale of the north 30 feet.

After careful consideration of all the evidence we have reached the conclusion that plaintiff was not the procuring cause of the sale of the land in question; that he was not entitled to recover any sum for commissions because of said sale and that the trial court erred in entering judgment against the defendant. The judgment of the Municipal Court is therefore reversed without remanding the cause.

JUDGMENT REVERSED.

Finding of Facts: We find as facts that Henry F. Norcott, plaintiff, was not the procuring cause of the sale of the land in question in this case, and that the defendant, Mary S. Frankenburger, is not indebted to plaintiff in any sum for commissions because of said sale.

387 - 20327

GREENMAN BROTHERS MANUFACTURING
COMPANY, for use of NATIONAL
TRUST & CREDIT COMPANY,

Appellant,

Appeal from
Municipal Court
of Chicago.

vs.
THE M. L. NELSON FURNITURE COM-
PANY,

Appellee.

1911A.494

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for costs, rendered by the Municipal Court of Chicago, January 6, 1914, in an action of the first class in contract, in favor of the M. L. Nelson Furniture Company, of Chicago, hereinafter referred to as the Nelson Co., defendant, and against the Greenman Brothers Manufacturing Company, of Batesville, Indiana, hereinafter referred to as the Greenman Co., for the use of National Trust & Credit Company, hereinafter referred to as the Trust Co., plaintiff. The cause was tried before the court without a jury, and the court, after a somewhat protracted trial, found the issue against the plaintiff.

In the statement of claim, filed May 20, 1912, it is alleged that the claim of the Greenman Co., for use, etc., is for the total sum of \$2,557.77, due and owing for certain consignments of furniture sold and delivered to the Nelson Co. by the Greenman Co. during the months of December, 1911, and January, 1912. An itemized statement, showing the dates and the respective amounts of the various consignments, is attached to the statement and made a part thereof. Interest is claimed on said total sum from February 1, 1912. In defendant's affidavit of merits, signed by G. E. Dewey, president of the Nelson Co., it is alleged that the Nelson Co. "is not indebted" to the Greenman Co., or to any one else, for the items and amounts as set out in said statement of claim, and that the Nelson Co. "has heretofore paid" to the Greenman Co. all

of the various amounts for the merchandise set out in said statement of claim, and that for said items neither the Greeman Co. nor any one else has any claim against the Nelson Co.

Under section 55 of the Practice Act, the defendant in its affidavit of defense is required to specify the nature of its defense. The purpose of this is "to give the plaintiff notice of the real defense to be presented and to limit the issues to be tried to the defense set out in the affidavit." (Kalish v. Furniture Brok. E. Co., 163 Ill. App. 276, 277.) We think that in the above affidavit of merits the only defense set forth is that of payment. We regard the other allegations as mere conclusions. (Kalish v. Furniture Brok. E. Co., Superior Tail v. Federal Life Ins. Co., 182 Ill. App. 332, 333.) And the burden of proving payment is upon the party pleading it. (Lucas v. Gahan, 122 Ill. App. 513; Robison v. Bailey, 113 Ill. App. 123.)

The Greeman Co. was engaged in the manufacture and sale of furniture, having its principal office and factory at Batesville, Indiana. The Nelson Co. was indebted to the Greeman Co. for certain furniture sold from time to time during the months of December, 1911, and January, 1912. On January 31, 1912, the Greeman Co., for a cash consideration then received, sold and assigned its accounts against the Nelson Co. for said furniture to the Trust Co., the beneficial plaintiff. These accounts are the ones sued on. It was agreed on the trial that the Trust Co. did not prior to April 15, 1912, formally notify the Nelson Co. that it had purchased of the Greeman Co. the said accounts sued on. Early in the trial G. E. Dewey, who was the president and treasurer of the Nelson Co., and who also acted as its general manager, was called as a witness for the plaintiff under section 33 of the Municipal Court Act. He was shown the affidavit of merits, signed by him, wherein it was alleged in substance that the accounts sued on had been paid, and he was asked to state when and how the same had been paid. He re-

filled in substance that payment was made on February 1, 1912, on which date he delivered to Monroe I. Greenman, general manager of the Greenman Co., five interest bearing notes, aggregating the total sum of \$3,526.79. These notes, stamped "paid," were subsequently introduced in evidence. Four of the notes were for \$500 each and one note was for \$326.79. They were all dated February 1, 1912, were signed by the Nelson Co., per G. E. Dewey, treasurer, and were payable to the order of the Greenman Co. They were due respectively in 30, 60, 105, 120 and 135 days after date. Subsequently during the trial Monroe I. Greenman testified in substance that on January 31, 1912, he came to Chicago and had an interview with Dewey; that he told Dewey that the Greenman Co. was much in need of money and that the Greenman Co. would "have to raise it in some way, not by your paying your accounts, but by bill of sale," and this for the reason that the accounts of the Greenman Co. were all sold and assigned to a trust company; that Dewey replied that he would endeavor to do something to help the Greenman Co.; that later in the day Dewey delivered certain papers contained in an envelope to him (Greenman) and he, without looking at the papers, hastened to catch a train going to Batesville; that while on the train he opened the envelope and found that the papers consisted of said five notes, aggregating the sum of \$3,526.79, and a statement or list of the accounts now in question; and that after he reached Batesville he wrote Dewey a letter, dated February 1, 1912. This letter was introduced in evidence. It is signed "Greenman Bros. Mfg. Co., by M. I. Greenman," and is in part as follows: "The writer is sorry to say that after leaving on the train and looking through the envelope that came in a way didn't help us a bit. * * You can readily see that if the paper you gave us straightened up the account you enclosed, it wouldn't do us one particle of good, - just passes through our book-keeper's hands on to the next man. We must have it on some account they haven't in their hands. * * Now, here is the way we want it, and hope that you will be kind

enough to so arrange. You will find an invoice to the amount of \$6,648.18, for the strong numbers. On this we have credited you to the amount of \$2,526.79, as per papers received from you yesterday. For the balance, we ask you to make out papers, and in receipt of which we will mail you new invoice, receipted in full. * * We are also returning to you the statement which we do not want paid now. * * Please answer on this immediately." It is evident that Greeman in this letter used the word "papers" as meaning notes. Dewey testified that he received the letter but that he did not answer it. Greeman, not hearing from the Nelson Co., or Dewey, in reply to said letter, again came to Chicago and met Dewey on Sunday, February 11, 1918. Greeman further testified in substance that at this interview he told Dewey that the Greeman Co. needed still more money, and that he asked Dewey what he thought about the bill or invoice that he had sent him; that Dewey replied that he did not like it as it was made up of goods which were still in process of manufacture and that an invoice had better be made up of goods that were then in Greeman Co.'s stock; that he (Greeman) also had a talk with Dewey about not being able to accept the notes in payment of the old account; that he said to Dewey "we will draw up a new bill of sale, providing the notes received January 11th and also these other ones"; and that Dewey then drafted the bill of sale contract. Dewey further testified in substance that at this interview Greeman said that the Greeman Co. needed \$3,000; that he (Dewey) thereupon drew up a receipted bill of sale for \$3,000, and handed it to Greeman; that Greeman handed it back, saying that he did not want it that way, but wanted it "to include the \$2,526.79, whatever the account is"; that thereupon he (Dewey) said that if the bill of sale contract was to be so drafted he (Dewey) would require a discount on the goods of 33-1/3%, instead of 18 and 5%; that Greeman agreed to this and thereupon he (Dewey) drafted the bill of sale contract, which was signed by both Greeman and himself in the names of their

The first of these is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The second is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The third is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The fourth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The fifth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The sixth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The seventh is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The eighth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The ninth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood. The tenth is the fact that the system is not a simple one. It is a complex one, and it is one that is not easily understood.

respective companies, and he delivered to Greenman \$3,000 in notes of the Nelson Co. This bill of sale contract, dated Chicago, February, 10, 1912, was introduced in evidence. It is therein provided that in consideration of \$5,526.79, paid by the Nelson Co. to the Greenman Co., the Greenman Co. "does hereby sell" to the Nelson Co. "such goods of their manufacture as are listed on the attached invoice, at the price and discount thereby specified, with the understanding that said merchandise is to be covered by insurance in the name of the M. L. Nelson Furn. Co. to the extent of \$10,000, premium to be paid by" the Nelson Co., and "with the further understanding that as soon as goods are shipped" by the Greenman Co. to the Nelson Co., or their customers on orders from the Nelson Co., "to the amount above specified, and to be billed by" said Greenman Co. "under regular terms as per previous contract, then this contract is to be cancelled immediately." The invoice or bill of sale attached to said contract contains the following words at the top: "Hateville, Ind. Feb. 2. 1912. Terms: As per contract. Sold to the M. L. Nelson Furniture Co., Chicago, Ill." Then follows an itemized account and description of the furniture sold, the prices and numbers of the particular pieces, and showing as the total price the sum of \$14,737.50; from this is deducted the discount, viz: "less 33-1/3% \$4,912.50," leaving the net sum of \$9,825; and underneath is "Rec'd payment on acc't. \$5,526.79" and signed "Greenman Bros. Mfg. Co., per Monroe I. Greenman." Hevey further testified that the Nelson Co. made an additional payment of \$1,000 on said bill of sale contract, shortly after the date of the contract, by sending two notes of the Nelson Co. of \$500 each to the Greenman Co. On March 5, 1912, the Nelson Co. made a second additional payment of \$1,000 to the Greenman Co. on said contract. On that date the Nelson Co. wrote the Greenman Co. in part as follows: "We beg to enclose you herewith two notes of \$500 each, making the second additional payment of \$1,000 on goods purchased from you under date of February 10, 1912, or a total payment to

late on this invoice of goods purchased of \$7,538.79." Dewey further testified that no further payments on said bill of sale contract were made by the Nelson Co. up to the time the Greeman Co. went into the hands of a receiver on April 2, 1913. It will be noticed that in order to make up the total payment of \$7,538.79 on the goods purchased under said bill of sale contract, as mentioned in said letter, the notes amounting to \$3,538.79 and given on February 1, 1912, would have to be included. The notes of \$3,000 given at the time the bill of sale contract was signed, added to the two subsequent payments by notes aggregating \$1,000 in each instance, only make a total of \$5,000.

From the evidence so above outlined, and from further evidence, we think it clear that, while the Nelson Co., by executing and delivering to the Greeman Co. on February 1, 1912, the said notes, aggregating \$3,538.79, intended at that date that said notes should be applied in full payment of the accounts here sued upon, yet the Nelson Co., at the request of the Greeman Co., subsequently agreed with the Greeman Co. that said notes should be applied in part payment of other merchandise sold by the Greeman Co. to the Nelson Co. under and by virtue of the bill of sale contract, dated February 10, 1912, and that such application of said notes was thereafter made. We also think that the evidence discloses that, while the Trust Co. did not until April 12, 1913, formally notify the Nelson Co. that it had purchased from the Greeman Co. the accounts sued on, yet the Nelson Co. had knowledge or notice, on February 2, 1913, that said accounts had been purchased either by the Trust Co. or some other company. And we are of the opinion, that the evidence does not show that the accounts sued on were paid by said five notes, aggregating the sum of \$3,538.79, or that the Nelson Co.'s plea of payment was sustained.

It appeared on the trial that on April 2, 1913, one Albert B. Wycoff was appointed by order of the Circuit Court of Rip-

lay County, Indiana, receiver of the Greeman Co. It further appeared that between January 31, 1912, and the date of the appointment of said receiver, the Greeman Co. and the Nelson Co. entered into various deals or transactions (separate and distinct from the bill of sale contract of February 12, 1912) which resulted in the purchase by the Nelson Co. from the Greeman Co. of various lots of other furniture and merchandise and in the payment of various sums of money to the Greeman Co. by the Nelson Co. The court allowed a full accounting of these transactions to be entered into, and at the conclusion of the trial, at the request of defendant, entered certain special findings of facts, among which was one to the effect that between January 31, 1912, (the day the accounts sued on were sold and assigned by the Greeman Co. to the Trust Co.) and April 18, 1912 (the day the Trust Co. formally notified the defendant, Nelson Co., that said accounts had been assigned to it), "the defendant corporation entered into various business transactions with the Greeman Bros. Mfg. Co., nominal plaintiff herein, in and by which, as appears from and by an accounting in this case made by the defendant herein, the Greeman Bros. Mfg. Co. was on April 18, 1912, indebted to the defendant herein in the sum of \$1165.01."

We do not think that under the plea of payment, as disclosed by the affidavit of verite, the court was warranted in permitting the Nelson Co. to introduce evidence as to said other deals and transactions. Early in the trial it was shown by the testimony of Dewey that the Nelson Co. relied upon the giving of said five notes, aggregating \$2,526.75, to sustain its plea of payment. It was afterwards disclosed that these notes were applied on another transaction, and that the accounts sued upon were not paid by said notes. The Nelson Co. then sought to show that by reason of other and separate transactions the nominal plaintiff, Greeman Co., was indebted to it for more than the amount claimed

to be due on the accounts sued upon. In other words, the Nelson Co. endeavored to prove a set-off under a plea of payment. "A set-off or cross demand, no matter how clearly proved, does not constitute a payment." (30 Cyc. 1130, note 1.) And a defendant cannot avail himself of a cross-demand against the plaintiff under a plea of payment. (Mayer v. Johnson, 134 Ill. App. 37, 30; 22 Am. & Eng. Ency. Law, 2nd ed. 378.) Furthermore, we do not think that, under all the evidence, the court was warranted in making the special finding that, on April 18, 1912, the Greeman Co. was indebted to the Nelson Co. in said amount, or in any amount. As it appears to us, the Nelson Co. was indebted on that date to the Greeman Co. in a large amount.

When Wycoff, receiver, took possession of the property of the Greeman Co. he found a quantity of merchandise in the storerooms of the Greeman Co. which seemingly belonged to the Nelson Co., but Wycoff refused to deliver the same to the Nelson Co. without an order of court. On April 23, 1912, which was seven days after the Nelson Co. had received formal notice from the Trust Co. that the latter had purchased the accounts sued on from the Greeman Co., Dewey, accompanied by his attorney, had an interview with Wycoff at Batesville, relative to the Nelson Co. securing possession of said merchandise. Wycoff testified in substance that at this interview mention was made of the claim of the Trust Co. on the accounts in question; that he (Wycoff) asked Dewey if the Nelson Co. still owed the accounts; and that Dewey replied that the Nelson Co. owed the amount of the accounts to somebody and that if the accounts had been sold to the Trust Co. the Nelson Co. owed the amount thereof to the Trust Co. On the same day the Nelson Co. filed a petition, sworn to by said Dewey, in the receivership case then pending in the Circuit Court of said Ripley County. In this petition the bill of sale contract of February 10, 1912, was set out in full, and it was alleged that

immediately after the making of said contract the Nelson Co. had taken possession of the merchandise referred to in the contract and had insured the merchandise in its name, and that it had already paid on account for said merchandise more than \$7,500. The petition prayed that the court order the receiver to turn over said merchandise to the Nelson Co. On April 25, 1913, the court entered an order in accordance with the prayer of the petition, said receiver consenting to the entry thereof. Henry J. Waleman, who acted as office manager for the receiver, Wycoff, testified in substance that on April 25, 1913, he was present at the interview above mentioned; that he (Waleman) in the presence of Wycoff said to Dewey that he (Waleman) wanted a definite understanding with him as to the account of the Trust Co., that the books of the Greenan Co. showed that the Nelson Co. owed the Trust Co. \$2,537.77, and inquired of Dewey if that was his (Dewey's) understanding of the matter; and that Dewey replied: "Yes, that is right, I will pay the National Trust & Credit Company, and there will be no controversy about that." Waleman further testified in substance that on or about July 18, 1913 (after the present suit had been commenced), he, in company with Wycoff, met Dewey at the office of the Nelson Co. in Chicago, and that Dewey then said to both Waleman and Wycoff that the Nelson Co. owed the Trust Co. and intended to pay that company, but that the Nelson Co. was hard up for money and needed time. Wycoff's testimony as to this interview of July 18th, and as to what Dewey then said, corroborated that of Waleman.

We have reached the conclusion from all the evidence that the trial court erred in entering a finding and judgment in favor of the defendant, and that the trial court should have entered a judgment in favor of the plaintiff and against the defendant in the sum of \$2,536.79, together with legal interest thereon from February 1, 1912. The interest on said sum from said date to February 23, 1915, at the rate of 5 per cent. per annum, amounts to \$386.73, and

judgment will, therefore, be entered here in favor of the plaintiff and against the M. L. Nelson Furniture Company in the sum of \$2,913.52.

JUDGMENT REVERSED AND JUDGMENT HERE.

FINDING OF FACTS. We find as facts in this case that on January 31, 1912, the defendant, M. L. Nelson Furniture Company, became and was indebted in the sum of \$3,536.79 to the nominal plaintiff, Greeman Brothers Manufacturing Company, on certain accounts, due and owing for certain furniture theretofore sold and delivered by said nominal plaintiff to said defendant; that on said date said nominal plaintiff sold and assigned said accounts for a valuable consideration to the National Trust & Credit Company, the beneficial plaintiff; that said defendant received notice of said sale and assignment of said accounts; that said defendant has not at any time since said date made any payment on said accounts or for said furniture; and that said defendant is still indebted on said accounts and for said furniture to the nominal plaintiff, Greeman Brothers Manufacturing Company, for the use of the beneficial plaintiff, National Trust & Credit Company.

THEOPHILA GALEWSKI,
Appellee,
vs.
CLOVER LEAF CASUALTY COMPANY,
a corporation,
Appellant.

Appeal from
County Court,
Cook County.

191 I.A. 496

STATEMENT OF THE CASE. On February 18, 1913, Theophila Galewski, as beneficiary named in an accident insurance policy issued to her husband, Frank Galewski, in his life time, commenced this action in the County Court of Cook County Against the Clover Leaf Casualty Company, a corporation having its home office at Jacksonville, Illinois, defendant. It was alleged in substance in plaintiff's original declaration that, on August 24, 1910, the Mutual Health and Accident Association of America, an insurance company, issued the policy to said Frank Galewski, and by it agreed to pay to the plaintiff upon the death of said Frank Galewski the sum of \$1,000, "in monthly payments of \$83 each on the 1st day of each and every month thereafter " " until the \$1,000 was fully paid," and further agreed to pay funeral expenses of \$50; that on May 20, 1912, the defendant assumed all the covenants and obligations undertaken by said mutual association in said policy; that on October 4, 1912, said Frank Galewski in the City of Chicago "sustained accidental injuries from which he died on, to-wit: October 21, 1912"; that afterwards plaintiff gave to the defendant notice and satisfactory proof of the death of Frank Galewski, and of the cause of his death, that said Frank Galewski during his life time, and plaintiff after his death, performed and complied with all the terms and conditions of said policy required to be kept and performed by each of them; that by means whereof the de-

defendant became liable to pay to the plaintiff the said sum of \$25 on the 1st day of each and every month after the death of said Frank Galewski, and also the said sum of \$50 as funeral expenses; and that, although the time for the payment "of the sum of \$100, being the sum due for the months of November and December, 1912, and January and February, 1913," and \$50 for funeral expenses, has long since elapsed, etc., defendant has refused to pay the same or any part thereof; to the damage of the plaintiff of \$200, etc. The policy and the written application of Frank Galewski were set out in haec verba in the declaration.

To this declaration the defendant filed a plea of the general issue. On July 11, 1913, on motion of plaintiff, it was ordered that the ad damnum be increased to \$1,000, and on the same day by leave of court plaintiff filed an additional count to her declaration, which count contained substantially the same allegations as the original declaration except that it was alleged that by the policy the insurance company agreed to pay plaintiff, "upon the death of Frank Galewski, the sum of \$1,000," and said funeral expenses of \$50, and that by means of the premises the defendant became liable to pay plaintiff "the sum of \$1,000 after the death of said Frank Galewski" and said sum of \$50 as funeral expenses, and that defendant has refused to pay said sums, to the damage of plaintiff of \$1,000, etc. Said policy and written application were also set out in haec verba in this additional count.

To this additional count the defendant filed a general and special demurrer, and on October 11, 1913, the court entered an order sustaining the demurrer, where-upon the plaintiff moved that said order be vacated and the hearing of the motion be continued. On October 18th the court vacated and set aside the order of October 11th sustaining said demurrer, and plaintiff was granted leave to file an amended declaration inalter, and defendant was ruled to plead or demur thereto within 5 days. Plaintiff, instead

of filing an amended declaration, filed an amendment to said additional count, in which it was alleged in substance that Frank Galeski had made all payments as required by the policy up to the time of his death and that the policy was in full force at the time of his death. To this additional count as amended the defendant filed a plea of the general issue.

The case was tried before a jury, and on November 21, 1913, a verdict was returned finding the issues for the plaintiff and assessing plaintiff's damages at the sum of \$1,000. Judgment for \$1,000 against the defendant was entered upon the verdict and defendant prayed and perfected this appeal.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is first contended by counsel for defendant that the judgment is excessive, because it appears from the terms of the policy introduced in evidence, and from other facts in evidence, that at the time the suit was commenced there could only be due, if any amount was due, the sum of \$150.

The insured died on October 21, 1912, and the suit was commenced about four months thereafter, on February 18, 1915.

Paragraph "A" of the policy, entitled "Specific Losses," is in part as follows:

"If any of the following specific disabilities shall result solely from such injury, within 90 days from date of accident, the Association will pay in lieu of all other indemnities under this policy.

For Loss of Life-----Principal Sum;
For Loss of Both Hands by Severance at or
above the wrist-----Principal Sum;
* * * * *
For Loss of Entire Sight of One Eye, if
irrecoverably lost -----1/5 Principal Sum.

The payment of all amounts for specific disability in Paragraph "A" shall be made to the insured or to his Beneficiary, if surviving, or in the event of her prior death, to the legal heirs of the insured in installments of Twenty-five Dollars on

the first day of each month until the full disability claim is paid, * * * "

It appears from the face of the policy that the "principal sum" is \$1,000, and we think that the words "such injuries," as used in paragraph "A", have reference to the preceding paragraph of the policy, where it appears that the insurance is "against Bodily Injuries, effected directly and independently of all other causes and solely through external, violent and accidental means (suicide whether sane or insane is not covered)." As we construe said paragraph "A", in connection with other provisions of the policy, the words "specific disabilities" have reference to the loss of the life of the insured, effected through external, violent and accidental means within 60 days of an accident, as well as to certain bodily injuries not resulting in his death, and we think that it is clear that upon the death of the insured, within such time and effected through such means, his beneficiary would not be entitled to be paid \$1,000 in a lump sum, but only "in installments of \$25 on the first day of each month" until said sum of \$1,000 should be fully paid. And, assuming that the death of the insured was caused through external, violent and accidental means, it appears that, when the present suit was commenced, only four installments of \$25 each had accrued, and were owing according to the terms of the policy, and also a funeral benefit of \$50, or a total sum of \$150. We are of the opinion, therefore, that the judgment of \$1,000 is excessive.

But it is contended by counsel for plaintiff that, because of the failure and refusal of the defendant to pay the first installment of \$25 when it became due, the entire sum of \$1,000 became due and payable. We think that this contention is without merit. (New York Life Ins. Co. v. English, 30 Texas, 333, 371.) It is further contended by counsel for plaintiff as we understand the contention that, because defendant filed to the additional count a special demurrer, in which the point was raised that only



the installments due could in any event be recovered, and because this demurrer was overruled and defendant did not stand by its demurrer but filed a plea of the general issue, defendant waived the point that an excessive sum was sought to be recovered and the question is not here preserved for review. We think that this contention is also without merit. The special demurrer to the additional count was at first by order of court sustained; then that order was vacated at the time plaintiff asked leave to file an amended declaration, and defendant was ruled to plead or demur to the same; then plaintiff filed an amendment to said additional count, and defendant did not demur to the same as amended but filed a plea of the general issue. It thus appears that no demurrer was filed to said additional count as finally amended. Furthermore, a demurrer does not admit the amount claimed. (Lindley v. Miller, 37 Ill. 244, 249; 31 Cyc. 337; Southern Ry. Co. v. Corzina, 109 Ga. 46, 50.) Nor does a demurrer admit as a fact that which appears not to be a fact on the face of the whole record. (31 Cyc. 337; Louisville & N. R. Co. v. Palmer, 109 U. S. 244, 253; Murray v. Murray, 39 Miss. 214, 221.) In the additional count the policy was set out in largo verba and from said count it appears that \$1,000 could not have been due at the time of the commencement of the suit.

It is also contended by counsel for defendant that the judgment should be reversed because the burden of proving the accidental death of the insured was on the plaintiff and that fact was not sufficiently proved to warrant any verdict and judgment in favor of plaintiff. The policy sued on contained the following provision:

"Proof as to injury must affirmatively establish the fact that such death or disability resulted directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, and the burden of proving affirmatively the validity of any claim shall rest with the insured or beneficiary."

It appeared from the evidence that on the morning of October 4, 1912, the insured was driving east in a buggy on 46th



street, Chicago. As he was crossing Ashland ^{avenue} a street car moving north on Ashland avenue struck the buggy, but did not tip it over, and subsequently the insured drove away in the buggy. Two witnesses to the occurrence testified that the buggy did not appear to be damaged or the insured injured. The evidence further showed that he worked at his usual avocation for several days after the occurrence, and continued so to do until October 18, 1912, and that on October 20th a physician was called, who found him in an unconscious state, and the insured was taken to a hospital, where he died on October 21st. In the coroner's verdict of October 21st, which was introduced in evidence, it was stated that "he came to his death on October 21, 1912, at Alexian Brothers Hospital, from septic meningitis, by extension from septic otitis media, following injuries when buggy owned and occupied by him east bound on 46th street was struck by north-bound car on Ashland avenue, about 9 o'clock a.m. October 4, 1912." The evidence was somewhat conflicting as to whether his death was the result in whole or in part from the injuries which it was claimed he received by reason of the occurrence of October 4, 1912. Inasmuch as we have reached the conclusion that the judgment of the trial court must be reversed and the cause remanded we refrain from a discussion of the evidence on this point. Suffice it to say that we are of the opinion that the evidence before us is not sufficient to warrant a verdict and judgment in any amount against defendant.

In view of what has been said it is unnecessary for us to consider the points raised by counsel for defendant concerning alleged errors in the admission of evidence and in the refusal of the court to give certain instructions asked by defendant.

The judgment of the County Court is reversed and the cause remanded.

REVERSED AND REMANDED.

1000

20362

421 - 20362

The People,
Appellees,

vs.

Appelles,

Appellants.

CHICAGO RAILWAY COMPANY,

Superior Court,
Cook County.

1911 A. 498

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1,635, rendered by the Superior Court of Cook County, in an action for damages for personal injuries, in favor of Abe Kern, plaintiff, and against the Chicago Railway Company, defendant. There have been two trials of this case. On the first trial the jury returned a verdict for \$2,150 in favor of the plaintiff, but the court granted a new trial. On the second trial a verdict for \$1,635 in favor of the plaintiff was returned, upon which verdict the judgment appealed from was entered.

At the time of the accident plaintiff was about 50 years of age. He was employed as a presser by the Continental Tailoring Company. Shortly after five o'clock on the afternoon of May 20, 1911, he left the place of business of said company, corner of Desplaines street and Jackson boulevard in the city of Chicago, and proceeded to Van Buren and Desplaines streets, intending there to take a west-bound car for his home. According to his testimony, in which he was corroborated by the testimony of two witnesses called in his behalf, after a west-bound car of the defendant had stopped at the crossing he attempted to board the car, and, when he had one foot upon the step of the car and one hand grasping the hand-rail, the car suddenly started with a jerk, his hand slipped from the rail and he fell backwards onto the ground and sustained severe injuries. He was taken to his home and subsequently conveyed to a hospital, where it was ascertained that the fibula of

his left leg had been fractured and that he had suffered other injuries. His leg was in a cast for two months, and he went back to work at the end of the month of September, 1911. He testified that he suffered great pain. There was testimony of medical experts as to the extent and permanent character of the injuries to his leg, and we cannot say, under all the evidence, that the verdict is excessive.

Besides urging that the verdict is excessive, the only points argued by counsel for defendant in their briefs, as grounds for a reversal of the judgment, are that the court gave an instruction, numbered 8, offered by plaintiff, and refused to give three instructions, numbered 18, 19 and 21, requested by the defendant. The court gave six instructions offered by the plaintiff and six offered by defendant. The court also gave two other instructions offered by the defendant, but as modified by the court. We have considered the given instruction, No. 8, and the refused instructions, Nos. 18, 19 and 21, in connection with the facts in evidence and the other instructions given. We have also considered the arguments of counsel. We do not think that any useful purpose would be served by discussing these instructions. Suffice it to say that in our opinion neither the giving of instruction, No. 8, nor the refusal to give any of the other instructions, Nos. 18, 19 and 21, in this case, constitutes such error as warrants a reversal of the judgment.

Finding no reversible error in the record the judgment of the Superior Court is affirmed.

ATTEST.

14 - 19319

EAT DUGGAN,
Plaintiff in Error,

vs.

WELLS BROTHERS COMPANY,
Defendant in Error,

ERROR TO SUPERIOR COURT OF
COOK COUNTY.

1911 A. 439

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

For convenience we will refer to the parties to this action as plaintiff and defendant as named in the trial court. The defendant was engaged as contractor in construction of a building on the northwest corner of Wabash avenue and Jackson boulevard, in the city of Chicago. The excavation for the basement had been made, and the wells, or caissons, upon which the weight of the building was to rest had been dug and filled with concrete. From ten to twenty of the iron columns or uprights to the height of one story above the street level had been set on the concrete in the wells or caissons. At the time of the accident to the plaintiff for which the action was brought, the defendant was making a ditch or trench, six or seven feet wide, and approximately sixteen feet deep in the basement, running from the northwest corner of the basement in a southeasterly direction. The sides of the trench were shored with perpendicular planks reaching to within a foot of the top. These planks were held in place by cross-timbers, or drums as they are called in the evidence, placed at intervals of two or three feet from the bottom to the top of the trench, and at every four or five feet throughout the length of the trench. In digging the trench, a temporary windlass and pulley hoisting device was put over the sections, resting on planks laid across the trench. The hoisting device consisted of four

posts converging at the top, where a pulley was suspended over which a rope from the windlass ran. The rope was hooked on a bucket which was lowered into the trench where the bucket was filled with material and then hoisted to the top of the trench.

On the day of the accident and for some days prior thereto, Duggan had been working on concrete work near the trench. At the close of the day's work on concrete he was directed by his foreman to work overtime in the trench, and was told where he could get wading boots. This was the first excavating work Duggan had done on this building. About seven-thirty o'clock, with a fellow-workman, Conroy, Duggan came to the trench, and his foreman said: "Boys, let's go down, and let's hurry up with the stuff." Duggan and Conroy thereupon climbed down into the trench on the drums, and Conroy, who was to dig, went into the section next south of the one in which the bucket was let down. As Conroy dug the clay he passed it between the drums to Duggan, who placed it in the bucket. When the bucket was filled Duggan signaled to the men above to hoist it. The section in which Duggan worked contained water a foot in depth, and there was a hole in the bottom where the water was about three feet deep. The bucket stood in the water while it was being filled, and not being watertight, water drained from it as it was hoisted. The easterly side of the section in which Duggan worked was partially covered with the temporary platform, there being a space of two and one-half feet square to let the bucket through, and spaces between the planks of three or four inches. The part near the western bank of the trench was uncovered.

One bucket had been filled with clay, and as it was being hoisted, Duggan stepped back toward the western bank to escape the water falling from the bucket. While waiting

1. The first part of the report deals with the general situation of the country and the position of the various groups of the population. It is a very good example of a general survey of a country and its people.

for the bucket to be dumped, Duggan reached for a floating piece of board to put under his feet. At that point of time a hard object from above fell on his head and rendered him temporarily unconscious. Conroy heard his cry, and, with the assistance of the men above, lifted him out of the trench. Blood was flowing down his face from a cut in his head. He was taken to a physician's office and it was found that his skull was fractured.

No one saw the object which fell upon Duggan. But while he was in the trench the defendant moved a thirty foot steel girder by means of a derrick over the place where he was working. The girder had laid at the base of a brick wall, and was covered with broken brick and other debris. While the girder was being hoisted and moved over the windlass, one end of it struck an upright column with sufficient force to jar the ground. Loose brick and other debris were scattered along the sloping sides of the trench in a position to be knocked or pushed into the trench. Men handling the derrick, and others, who were putting electric lights into the trench, were passing along the sides of the trench at the time of the accident.

The negligence averred in four counts of the declaration in various forms was that the defendant failed to cover or, protect the trench properly to prevent the loose stones and brick along the trench and over it from being brushed or shoved or dropped into the trench where plaintiff was working. The fifth count was not submitted to the jury. The trial resulted in a verdict of not guilty, on which judgment was entered.

Complaint is made of the number of instructions given at the request of defendant, and that some of them were erroneous. The court gave forty-five instructions, eleven of

which were requested by the plaintiff, and refused to give five instructions requested by the defendant. By tendering so many instructions to the court, counsel for the defendant imposed an unnecessary burden on the trial court and on reviewing courts. The practice cannot be condemned too strongly. It is not going too far to say that it tends to produce unjust results and to inject errors into the record. These are doubtless the objects sought in many cases. The practice is condemned by every sound canon of legal ethics pertaining to the trial of causes. Lawyers owe important duties to the courts. Among these is the duty to uphold the honor and dignity of the court, and not to turn a solemn judicial investigation of the rights and obligations of the parties before the court into a mere game to secure particular results regardless of equity and justice.

No evidence was offered by the defendant controverting the evidence offered on behalf of the plaintiff on the question of liability.

The evidence as to what fell upon and injured the plaintiff is circumstantial. That a brick or some material fell upon the plaintiff from above him, there can be no question. From all the facts and circumstances shown by the evidence, it is a fair and reasonable inference that the object would not have fallen upon him if there had been some guard around the edges of the trench to prevent loose material from being knocked or shoved into the trench by other workmen who were at work around the trench, or if the trench had been covered with planks. There were no such guards or covering. The plaintiff was working in the trench under orders from the defendant. Plaintiff was not in position to know how extensive the work might be carried on above him, or whether any work would be carried on while he was in the excavation which

would affect his safety or expose him to peril from above. Defendant knew all these facts and controlled the operations above the plaintiff. If there was danger of obstacles falling upon the plaintiff, as a result of the operations above him, it was the duty of defendant, in the exercise of ordinary care for the plaintiff, to discontinue such work or to guard the plaintiff against such danger. The evidence shows that the defendant neglected to discharge this duty. The verdict and judgment is manifestly against the evidence. This result was caused without doubt by the confusion produced in the minds of the jurors by the large number of instructions given, some of which were erroneous and misleading.

Instruction 39, given at the request of defendant, was as follows:

"In the absence of proof to the contrary, the law presumes that every employe understands the ordinary dangers of the employment when he engages therein, and if not, that such employe would inform himself thereof. The defendant was not bound by law to take more care of the plaintiff than the plaintiff was bound to take care of himself."

The last sentence of the instruction has no relation to the preceding part of the instruction. It is error to instruct the jury, where a servant works at a particular place under orders from his superior, that the master is not bound to take more care of the servant than the servant is bound to take of himself. (Western Stone Co. v. Muscial, 196 Ill. 382; Illinois Steel Co. v. Wierzbicky, 206 Id. 201).

The latter part of instruction 44 reads as follows:

"If the inference reasonably drawn from all the facts in evidence in this case are logically and fairly consistent with the contention that the injury to the plaintiff was a pure accident for which defendant was not to blame, then you should find the defendant not guilty."

The first part of this instruction does not ex-

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people for many years. It is a fact which has been recognized by the government and the people for many years. It is a fact which has been recognized by the government and the people for many years.

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Journal of Management Education 30(6)p.789-804

plain or qualify the latter part. It instructs the jury that they may find for the defendant if they find that the inferences in favor of a pure accident are reasonable and logical, whether such inferences are supported by a preponderance of the evidence or not. It was the duty of the defendant to exercise reasonable care to provide the plaintiff with a reasonably safe place in which to work. The defendant had ordered the plaintiff to work in the trench. The work which plaintiff was doing in the trench did not create any danger or make any changes in the risk of plaintiff's work as it progressed. The above rule, therefore, applied to defendant, although it was engaged in constructing a building. We think the instruction was erroneous. (Lerry State Bank v. Ellledge, 109 Ill. App. 179, 184.) In Boce v. Ill. Cent. R. R. Co., 23 id. 643, 649, it is said:

"Where it may be contended that the facts will equally support one inference or another, the court is not at liberty on such ground to take the case away, but must submit it to the jury to determine which is the correct inference of fact to be drawn from the evidence."

What we have said above condemns instruction 34 which told the jury that the general rule of law which ordinarily obliges the master to exercise ordinary care to furnish a servant with a reasonably safe place in which to work does not apply in those cases where the work the servant is employed to do is in connection with construction and demolition of buildings, if of such a nature that the character of the surroundings and situation is continually changing. This instruction was misleading as applied to the evidence in this case. (Pressed Steel Car Co. v. Herath, 110 Ill. App. 596, 601; Barnett & Record Co. v. Schlapke, 208 Ill. 436, 438; Essey v. Kelley-Atkinson Co., 240 id. 416, 421.)

The court erred in instructing the jury that under the first and fourth counts of the declaration plaintiff

must prove a negligent order to entitle him to recover. This error appears in the third paragraph of the 13th instruction, and was repeated in the third paragraph of the 16th instruction. The negligence averred in those counts was the failure of the defendant to place any covering or protection over the excavation to prevent loose stone, brick and other material being knocked or pushed or dropped into it.

For these errors the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

202 - 19592

ADOLPH NIX,
Plaintiff in Error,

vs.

BRUNSWICK-DALKE-COLLENDER
COMPANY, a corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COCK COUNTY.

191 I.A. 303

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This case was before this court on a former appeal. (Brunswick-Dalke-Colleander Company v. Nix, 138 Ill. App. 559.) The substantive facts and the nature of the case are there stated.

This judgment must be reversed and the cause remanded for errors in procedure hereinafter referred to. If the verdict and judgment are sustained by the evidence, the errors in instructions would not need to be discussed, for if the plaintiff has no right of action upon the evidence and the law applicable thereto, the errors in instruction would not be material. But we are of the opinion, upon a review of the record, that the question of negligence alleged in the different counts of the declaration and the evidence offered in support thereof present a question for the jury, and that the verdict of the jury is manifestly against the weight of the evidence. Inasmuch as the case must be retried, it is necessary to indicate our views upon the instructions for the purpose of indicating to the trial court the law upon the case with a view of facilitating the future trial of the case, if it shall ever be retried.

The trial court refused thirty-three instructions offered by the defendant, presumably upon the ground that they were either bad or covered by other instructions. It gave

1944 - 1945

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, D. C.

MEMORANDUM FOR THE CHIEF OF STAFF
SUBJECT: [Illegible]

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twenty instructions offered by the defendant, many of which, as we shall see, were erroneous. It would be difficult to characterize the unreasonable conduct of the defendant in tendering to the court so many instructions in a simple case like this, involving no special difficulty either in law or fact. There is no legitimate reason for tendering so many instructions for the consideration of the court in this case, and we deem it our duty to again, as we have so often done before, criticize the parties and the attorneys for tendering to the court so many instructions where a few only are needed to properly submit the case to the jury. The twenty instructions requested by the defendant and given by the court, contain many repetitions to the same purport and effect which emphasized and brought to the attention of the jury what would appear to be the opinion of the court upon the facts. This has been so frequently condemned by courts of review of this State that it is unnecessary to repeat the reasons for such condemnation.

The plaintiff in-error, a boy seventeen years of age, was employed by the defendant in-error. Plaintiff in-error was employed on a lathe which for temporary purposes was fitted up for boring small holes in the side of stoppers to be fastened to wires and used in keeping the counts in billiards. There were thirty-three counters made to every one stopper. The holes bored in the side of the stopper were for the purpose of inserting a screw by which the stopper was made rigid on the wire. The lathe was ordinarily used for another purpose, and was prepared for the purpose of boring these holes by the insertion of a wooden plug into the spindle on the lathe. The spindle was made of metal with an opening at the outside end which was $5/8$ " in diameter and tapered down toward the end that went into the lathe-head. The inside of the spindle was

smooth, not threaded, and the plug was not threaded. The plug was held in the spindle only by being firmly driven into the end of the spindle. The plug contained a gimlet or bit which bored the holes. Fitted out in this way, the lathe was operated by steam, connected by belts and pulleys to a power shaft which caused the bit or gimlet to be revolved at the rate of 3300 to 4000 revolutions per minute. The machine had no regular attachment to place on it for use in boring holes. It was in reality an automatic wood-cutting machine, and was used only occasionally for the use to which it was devoted when the plug flew out of the spindle and destroyed one of plaintiff's eyes.

The evidence of the plaintiff tended to show that the plug, when fastened into the spindle the last time before the accident, extended into the spindle a distance of only one-half to five-eighths of an inch. The defendant's evidence tended to show that the plug extended into the spindle anywhere from one to two and one-half inches.

Plaintiff had used the machine about four times before he was hurt, or only about fifteen hours covering a period of about three weeks. He never set the plug into the spindle himself. The plug had to be set exactly true and was set by Schwartz, a skilled wood-turner. The defendant's foreman told Schwartz to set the plug for plaintiff and he did so on each occasion. The plug was set by driving it in tight to secure it, hammering the sides and turning the belt until it was exactly true. On August 10, 1901, the plug and bit which it contained flew out of the end of the shaft in which it was held, striking the plaintiff in the eye. He at that time was not engaged in boring a piece of wood, but was reaching for a piece to be bored when the wooden plug with the bit flew out of its socket. On August 9th, the day before the accident,

plaintiff went to Schwartz, as directed by the general foreman, and told him that he had come boring to do and requested him to place the plug in the spindle. Schwartz put it in and the plug came out after being used awhile and fell upon the floor. Plaintiff went to Schwartz and told him that the plug had come out and Schwartz put it in again, saying, "It is all right. It won't come out again," and thereupon plaintiff resumed the use of the machine, and was shortly thereafter injured as above set forth. Schwartz was a skilled wood-turner, and testified that he drove the plug into the hole in the lathe in such a manner that the bit would run perfectly true and that it required skill to do it.

Instructions 1, 2, 3, 6 and 13, given by the court were upon the law of assumed risk as applied to this case. All of these instructions except No. 6 concluded with the expression that upon the hypothesis mentioned in them the plaintiff could not recover, or that they should find the defendant not guilty.

Instruction 1 given by the court is as follows:

"You are instructed that a minor who engages in work assumes the risks and dangers which are ordinarily incident to such work so far as he is competent to comprehend and appreciate them and so far as from his intelligence and experience he might reasonably be expected to understand them. A minor assumes all the risks of his employment which are open and obvious to him and assumes the risks and dangers of his employment which he knows and understands or which in the exercise of ordinary attention on his part he could understand and know. His employer is under no obligation to instruct him as to matters or things the risk or danger of which the employee understands, and if you find from the evidence in this case that the plaintiff's injury was the result of a risk or danger which the plaintiff understood and appreciated or which by the exercise of ordinary care and attention to his surroundings he could have understood and appreciated, he cannot recover in this case."

This instruction told the jury that the plaintiff could not recover if the injury was the result of a danger which he appreciated or which he should have appre-

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861. It is a very important document, as it sets out the President's policy on the secession of the Southern States. The President states that he is bound to maintain the Union, and that he will use all the power at his disposal to do so. He also states that he will not recognize the secession of any State, and that he will treat the seceding States as rebellious. This letter is a key document in the history of the Civil War, as it shows the President's stance on the issue of secession.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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U.S. DEPARTMENT OF AGRICULTURE, BUREAU OF PLANT INDUSTRY, WASHINGTON, D.C.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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ciated. No reference is made to the order and assurance of Schwartz. It is clear that even if he knew the plug might become loose and fall out of the spindle, yet, considering such order, he could recover, for Schwartz was delegated by the defendant to insert and adjust the plug and bit for use, and gave him the assurance which is above set forth. Furthermore, there is no evidence in the record that this boy, seventeen years of age, with very little experience in this particular kind of work, knew that the flying out of the plug was an ordinary risk and danger incident to that work, or that he was competent to comprehend and appreciate the risks and dangers. It was not an open and obvious risk and danger of his employment under the proofs in this case.

Instruction 2 is open to the same objection as that above made to instruction 1.

Instruction 3 told the jury that if they found from the evidence in the case that the lathe and plug complained of in the case had been in use by the plaintiff from the time he was first employed by the defendant, and that whatever danger was involved in the use of the same was obvious and patent to the observation of any person of ordinary intelligence, age and experience of plaintiff, and that the condition of the lathe and plug remained the same during the entire time of the service of the plaintiff in and about the same, and if the jury further found from the evidence in the case that the plaintiff was a person of ordinary intelligence for one of his age and capable of understanding and appreciating the conditions and dangers involved in the use of the lathe and plug, then they were instructed that the plaintiff assumed the risk involved in the use of the same and could not recover.

This instruction assumes that there was evidence that the plug was used by the plaintiff all the time he was employed by the defendant. The evidence shows that he was employed as a laborer for one year before he started on the machine work. Different sized plugs were used as shown by the evidence. He only bored stoppers for a period of twelve or fifteen hours in all, and on not to exceed four different occasions. The instruction does not take into consideration the order and assurance of Schwartz.

In our opinion instructions 6 and 13 are open to the objection that they ignored the order and assurance of Schwartz and that they assumed that there was evidence tending to show that the plaintiff appreciated and understood the danger of the plug's flying out in the operation of the machine, and that such danger was open and obvious to the plaintiff.

Instruction 13 further told the jury that if they believed from the evidence that the plaintiff, by giving ordinary care and attention to things about him and to the mechanism and operation of the machine, would have known and understood that there was a possibility that the bit in question might become loose in the socket of the spindle and fly out of that socket while the spindle was in motion, then the plaintiff assumed the risk, and that the jury should find the defendant not guilty. We think the instruction was objectionable and misleading for want of evidence upon which to base it, and in that it held the plaintiff assumed the risk on the mere possibility that the bit and plug in question might fly out of the socket. No account under these instructions was given to the effect of the specific order and assurance of Schwartz given to the plaintiff. (Cobb Chocolate Co. v. Hudson, 307 Ill. 452;

Byrne v. Field & Co., 237 *id.* 384.)

In Hartrich v. Hawes, 202 *id.* 334, the court held that modifications in instructions were properly made so as to cover the question of knowledge of the apparently dangerous character of the defect in the machine, and said on page 340:

"In Swift & Co. v. O'Neill, 187 *Ill.* 337, in discussing the question, whether a servant is barred of a right of recovery for injuries incurred by working in an unsafe place or using appliances known by him to be defective, on the ground of assumed risk, we said (p. 344): 'Hence, although he may know of the defects, yet unless, under all the facts and circumstances in the case, it can be said he knew of the extent of the danger, he may still maintain his action. That is to say, an employe may know of such defects in such place or appliances, and yet be justifiable in the belief that, by the exercise of proper care, no immediate danger from such defects will be incurred, and, therefore, his right of recovery not be defeated. The true rule as nearly as it can be stated, is, that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if, under all the circumstances a servant of ordinary prudence, acting with such prudence, would under similar conditions have continued the same work under the same risk; but not otherwise. All the circumstances must be taken into account, and not merely the isolated fact of risk.' (1 Shearman & Redfield on Negligence, Sec. 211). 'Where the instrumentality, with which a servant is required to perform service, is so glaringly defective that a man of common prudence would not use it, the master cannot be held responsible for damages resulting from its use. But if a servant incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose it may be safely used with great skill or care, mere knowledge of the defects on the servant's part will not defeat a recovery'."

In Libby, McNeill & Libby v. Cook, 222 *Ill.*

206, the court said:

"It is said, however, that as appellee called the attention of the foreman to the opening, and as the defect was not remedied, and appellee continued in the employ, he assumed the risk. * * * While he had knowledge of the defect it does not appear that he had knowledge of the danger, and under such circumstances it cannot be said that he assumed the risk."

To the same effect are C. & E. I. R. R. Co. v.

Inapp, 176 *id.* 126; Packer v. Sarahall Field & Co., 170

Ill. App. 237; Montgomery Coal Co. v. Harringer, 218 *Ill.* 327.

In the Barringer case, *supra*, it is said at page 332:

"if, however, the danger which follows from the use of a defective appliance or from working in an unsafe place is such that requires long experience or a knowledge of intricate machinery or the possession of expert or scientific knowledge in order that the danger may be apparent to the person using the defective appliance or working in the dangerous place, a man without such experience or knowledge will not be presumed to understand or comprehend such danger from knowledge, alone, of the defect in the appliance or place, and in such case a knowledge of the defective condition of the appliance will not defeat a right of recovery unless the servant, in addition to a knowledge of such defect, comprehends the danger to which he is exposed from the use of the appliance or from working in the place."

We think there is no evidence in the record direct or circumstantial or from which proper inferences might be drawn that Nix knew or should have known that the plug might fly out and injure him. He had never seen it fly out. True, he had seen it drop out upon the floor, but it was replaced with the assurance by one qualified to know that it was all right and would not come out again. There was no basis in the evidence for the jury to find that the danger of the plug's flying out was so obvious and patent that this seventeen-year-old boy could know and appreciate the danger to which he was exposed. Nor was there any evidence in the record, in our opinion, which in any manner justified giving the instructions upon the question of assumed risk. (Libby, McNeill & Libby v. Cook, *supra*.)

There is no evidence in the record which furnishes a basis for the "simple accident" theory embodied in instruction 14. It is a peremptory instruction, and was misleading in its effect on the jury.

There is no evidence in the record on which to base instruction 11.

For the reasons given, the judgment is reversed and the cause is remanded to the Superior Court for a new trial.

REVERSED AND REMANDED.

272 - 19668

FOSTER DRUG COMPANY,
a corporation,
Defendant in Error,

vs.

ZELLER AND SONS COMPANY,
a corporation,
Plaintiff in Error.

FILED TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 508

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

On July 28, 1911, the defendant in error, Foster Drug Company, bought some silverware of the plaintiff in error, Zeller & Sons Company, for \$127. The contract therefor was in writing and contained the following provision:

"If proposition is unsatisfactory after six months' trial, all goods on hand to be repurchased by Zeller & Sons Co., Inc., Chicago, Ill., at original invoice price."

On November 29, 1911, defendant in error, having been then reminded by Zeller & Sons Company, that if it desired to avail itself of the repurchase provision of the contract it must first pay for the goods, sent to plaintiff in error a check for the original purchase price, which check contained on the back of it the following statement:

"This check is given in payment of invoice dated July 28, 1911, for silverware, and is given with the distinct understanding that the firm of Zeller & Sons Company of Republic Building, Chicago, Ill., collectively or individually, their heirs, successors or assigns, will repurchase the remainder of all the original purchase as per above dated invoice of silverware remaining on hand February 15, 1912, at the original invoice price. The acceptance of this check is an acceptance of the above conditions.

Foster Drug Co.,
per M. E. Lyons."

Zeller & Sons Company accepted this check and cashed it.

On March 25, 1912, the Foster Drug Company returned to plaintiff in error all of the silverware left of the original purchase, amounting to \$84.15, at the original invoice price. Before shipping the goods to defendant in

error they were examined and identified by W. A. Eric, who sold the goods to the Foster Drug Co. originally. Eric also assisted in packing the goods, and checked up the same and found them to agree with the invoice. The goods were then shipped, via American Express Company, to the plaintiff in error, who refused to receive them back. Thereupon this action was brought for the invoice price of the goods so returned. The case was tried by the court without a jury and there was a finding and judgment for the plaintiff for \$84.15.

Error is assigned upon the refusal of the court to suppress the deposition of W. A. Eric, taken on behalf of the defendant in error on oral interrogatories. The ground urged for the suppression of the deposition was that the commissioner propounded in person the oral interrogatories to the witness. Under Sec. 38, Chap. 51, Hurd's R. S., we think the ground for suppressing the deposition not well taken and that the trial court did not err in overruling the motion to suppress.

It is further urged that the trial court erred in striking out certain material allegations in plaintiff's amended affidavit of merits. This point is not well taken for the reason that the portions of the affidavit stricken out did not present a defense to the action.

Complaint is made that the court admitted the letter of March 26, 1912, from defendant in error to plaintiff in error, and the invoice of articles therein referred to without any proof that the letter was properly addressed and mailed, with postage prepaid, or was received by the plaintiff in error.

The case was tried by the court without a jury and even if this evidence was improperly admitted, it would

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States.

not be reversible error since it will be presumed that the court disregarded any improper evidence and decided the case on the proper evidence only, when there is sufficient competent evidence to justify the finding of the court.

(Iratt v. Davis, 224 Ill. 306; Per. U. T. Co. v. Seesting, 89 id. 152).

Furthermore, the objection to the testimony, which was by deposition, was not raised before the trial and was, therefore, waived. (Benedict v. Dakin, 243 id. 324).

The evidence in the record clearly shows that when the plaintiff in error sold the goods to the defendant in error, it was upon condition to repurchase the same at the original invoice price. By its letter of November 23, 1911, plaintiff in error acknowledged that there was a repurchase provision in the order, but insisted that it was not binding on plaintiff in error until after six months' trial, and if then the goods were not satisfactory it agreed to repurchase them; and called attention to the terms of the contract, and that the ninety days had expired, and the remittance of the defendant in error was past due, and then states: "Now, if you desire to make the buy back privilege binding, kindly send us your remittance to balance account at this time." Thereupon defendant in error remitted by check, dated November 29, 1911, which was accepted and cashed by the plaintiff in error. The check contained the agreement endorsed on the back of it above set forth. In thus insisting upon a remittance by the defendant in error before it could avail itself of the repurchase provision of the contract, plaintiff in error recognized that provision and, in fact, re-affirmed it, and agreed to repurchase the goods when the six months' period had expired. After the lapse of the six months' period defendant in error shipped the goods

to plaintiff in error and delivered them to the American Express Co. at Portland, Oregon, properly addressed, and notified plaintiff in error that the goods were being returned. The delivery of the goods to the Express Company was a delivery to plaintiff in error. (City of Barthage v. Buval, 202 Ill. 234). The title to the goods passed to plaintiff in error when the goods were delivered to the American Express Co. There was no provision in the contract in regard to tender of the goods, or in regard to inspection or the manner in which they should be shipped, - whether by express or by freight. The trial court did not allow plaintiff in error anything for expressage. The plaintiff in error did not refuse the goods on the ground that they were shipped by express. The testimony of the plaintiff in error's manager was to the effect that his company was prepared to repurchase the goods as soon as it had an opportunity to inspect them; that it had at all times been prepared to accept these goods if it had an opportunity to inspect, and had been given the information as to quantity and quality on hand. The refusal of the goods upon that ground was a waiver of all other grounds of which the party then had knowledge. (Hull v. Peters, 7 Barb. 331; Neill v. American Metal Co., 180 Ill. 1287.

In our opinion the judgment of the trial court is just and without reversible error, and it is affirmed.

AFFIRMED.

385 - 19784

JENS JACOBSEN, Petitioner,
Plaintiff in Error,

vs.

CITY OF CHICAGO et al.,
Defendants in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

191 I.A. 511

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

On February 9, 1912, the petitioner, Jacobsen, filed his petition for a writ of mandamus against the city of Chicago, the Fire Marshal and the Civil Service Commission, commanding them to reinstate the petitioner in his position as driver in the fire department in said city of Chicago and place petitioner's name on the pay-roll of the said fire department.

The cause was tried before the court without a jury, resulting in a judgment denying the writ of mandamus.

Jacobsen held the office or position of driver in the fire department of the city of Chicago, pursuant to a certification by the Civil Service Commission and appointment under the terms of the Civil Service Act, on September 19, 1910. On the same day, on account of the illness of his wife, he applied to the Fire Marshal for a leave of absence for a year. The Fire Marshal advised the petitioner that he could not grant leave of absence for more than thirty days at a time, but that he would extend his leave from time to time. The petitioner thereupon obtained leave of absence for a period of thirty days from September 19, 1910, and removed with his family to Indiana where he had leased a farm. On October 19, 1910, he made application for extension of his leave of absence for another period of thirty days. The extension was allowed but the petitioner received no notice thereof. The record shows that Jacobsen made no further application for extension of his leave of

absence and made no claim to be reinstated to his office or position until he returned to Chicago on or about August 15, 1911. He was then informed that his resignation had been accepted on October 25, 1910.

It appears from the record that Driscoll, battalion chief over Jacobsen, and Capt. Strook, not being informed that the Fire Marshal had extended Jacobsen's leave of absence, investigated the action of Jacobsen, and Capt. Strook went to Jacobsen's farm near Valparaiso, Indiana, for the purpose of making an examination and a report concerning his absence. Strook did not see Jacobsen but left word with his wife that Jacobsen should either return to work or send in the city property, such as the badge, cap, insignia, etc., which belonged to the city of Chicago. Within a week thereafter the insignia of office or position were received by Capt. Strook through the mail accompanied by a letter, the contents of which do not appear in the record. Thereupon Capt. Strook made out and signed Jacobsen's resignation of his position and his name was dropped from the pay-roll of the department.

A demurrer was filed to the petition of mandamus but was overruled and the respondents answered, denying that the Fire Marshal arbitrarily and without legal cause erased the name of the petitioner from the pay-roll of the fire department and denying that the petitioner had at all times been ready and willing to perform the duties of his position, and setting up that the Civil Service Commission and the Fire Marshal had taken under consideration the application of the petitioner to be reinstated and had refused to comply with the petitioner's request in that regard.

The granting of the writ of mandamus is discretionary with the court in view of all the existing facts and with due regard to the consequences which may result. In granting or refusing writs of mandamus the courts exercise judicial discretion and are governed by what seems necessary and proper to be done in the particular instance for the attainment of justice. Courts may refuse the writ though the petitioner has a clear legal right for which mandamus is an appropriate remedy where it can be seen that it cannot accomplish any good purpose or where it will fail to have a beneficial effect. (Khanneally v. City of Chicago, 220 Ill. 485.)

The facts in this case indicate that the petitioner was negligent in protecting his rights, if he had any, to the position of driver in the fire department. He seems to have made no inquiries to determine whether his leave of absence was extended after October 19, 1910, nor did he in any wise concern himself about the visit of Capt. Strook to his place of residence, upon whose request he claims to have surrendered all his insignia of his position. Whether the petitioner did or did not intend to resign or to abandon his position can be determined only from his acts and not from the testimony as to what was in his mind at the time. If he did not intend to resign, he was clearly guilty of laches in neglecting to keep himself informed as to his status from time to time in view of the fact that at the outset he was advised that leave of absence could be granted for a period of only thirty days at a time.

A period of over fifteen months elapsed between the time of his removal and the date of his filing the petition in this case. No excuse or justification for his long

absence from duty or for his ignorance that his leave of absence had not been extended after November 19, 1910, is shown. In our opinion the writ in this case was properly denied because of the unreasonable delay of the petitioner in presenting his petition for the writ. He seems to have paid no attention for substantially a year to the question whether he had been excused from duty or his leave of absence had been extended. There is no excuse presented for his indifference and delay. We think the laches of the petitioner was a sufficient ground for refusing the writ. (Blake v. Lindbloom, 225 Ill. 555).

We are further of the opinion that, aside from the question of laches, there is sufficient evidence in the record to justify the judgment of the trial court upon the ground that the plaintiff in error resigned or abandoned his position. (People v. Hanifan, 96 Ill. 420). A resignation by implication may take place by an abandonment of official duty without leave of absence or without good excuse shown. (Dennison v. Spencer, 101 Ill. App. 61). In Harbour v. United States, 17 Ct. of Claims, 149, it was held that the resignation of an office is the act of giving it up, and is synonymous with surrender, relinquishment, abandonment or renunciation. In law a written resignation is unnecessary. It may be by parol and it may be either express or by implication. The intention to resign or abandon may be inferred from the conduct of the party. If that conduct takes the shape of non-user or neglect of duties, so as to amount in itself to an actual vacation, but without express renunciation of the office, a sufficient abandonment or resignation is shown.

Under the circumstances shown by the record, we think the Fire Marshal and the Civil Service Commissioners

were justified in treating the position of petitioner as relinquished and abandoned.

The judgment of the trial court is affirmed.

AFFIRMED.

377 - 20315

FRANCES MARY WELLMAN,
Appellant,

vs.

MAYRE FAIGR WELLMAN,
Appellee.

APPEAL FROM SUPREME COURT
OF COOK COUNTY.

191 I.A. 514

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

On March 8, 1913, the complainant, appellant, filed her bill against defendant for divorce and alimony on the ground of extreme and repeated cruelty, and also prayed for an injunction restraining him from in any way interfering with her or her child about to be born.

The amended bill of complaint filed later by leave of court alleged seven specific acts of cruelty, giving the dates thereof, and that on diverse days and times since their marriage defendant had beaten, punched, struck, choked and otherwise cruelly abused and illtreated the complainant, and has threatened her life, so that her life has been rendered miserable.

The defendant answered the bill, denying all the allegations of cruelty.

A jury was demanded by the complainant. The cause went to trial upon the amended bill, answer and replication. The jury returned a verdict finding defendant not guilty.

Upon a review of the record we have come to the conclusion that such errors were committed during the trial that the verdict and decree based thereon must be set aside and reversed. The trial, in our opinion, was not a fair trial. We shall confine ourselves to a brief discussion of these errors, and shall refrain from discussing the merits

of the case for the reason that there must be a new trial.

During the trial of the case the court by its rulings required the complainant to confine her proof and testimony strictly to the dates specifically alleged in her amended bill, and refused to allow her to put in any testimony under the general allegation of acts of cruelty alleged to have been committed by the defendant from September 7th to the middle of October, 1912. This was material error. The rule as to proof of general allegations of the above nature in a bill for divorce is well stated in 14 Cyc. 668, as follows:

"The acts of cruelty should be alleged with reasonable certainty as to time and place. However, the exact day and place of each particular act need not be alleged and when the conduct complained of is continued and not confined to any particular time or locality, the specific allegation of time and place is impracticable and should not be required."

In Bobowski v. Bobowski, 242 Ill. 524, only two acts of cruelty were recited in the decree and there was then the general finding: "That on divers other occasions he was guilty of extreme and repeated cruelty by assaulting and doing her personal violence." In discussing the sufficiency of these findings, the court said:

"The fact that only two dates were given when plaintiff in error committed the acts of violence and cruelty against defendant in error and that one of them was 15 years before the trial, does not render the finding insufficient, supplemented as it is by the further finding that the plaintiff in error had been guilty of extreme cruelty to his wife by assaulting her on divers other occasions and doing her personal violence and the sufficiency of these findings of fact is not destroyed because the dates of these acts are not given."

There is clearly indicated in the language of the court that wherever there is a general allegation of divers acts of cruelty at other times than those specifically mentioned, evidence is admissible to supplement the evidence produced under the specific allegations. We think there can be no doubt that under the allegations of the bill the com-

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plainant had a right to put in proof concerning acts of the defendant which were referred to in the bill as occurring between the 7th day of September and the middle of October.

In the Encyclopaedia of Pleading and Practice, vol. 7, page 79, the rule is stated as follows:

"It is not necessary to allege each act constituting the course of ill-treatment, for while the decree must be based upon the acts of cruelty alleged and not upon other acts, yet, the other acts not specifically alleged are admissible to give color to the acts charged and to inform the court or the jury of the general conduct of the parties and their attitude toward each other."

We think the court erred in refusing the complainant leave to amend her amended bill during the trial by setting out an act of cruelty committed October 26, 1912, by the defendant under the facts and circumstances set forth in the affidavits presented and filed in support of the motion for leave to amend.

After refusing to allow the amendment to be made and refusing to admit testimony as to what occurred on October 26, 1912, the court permitted the defendant and his mother and father to testify to a quarrel that occurred on that date. Counsel for complainant attempted to cross-examine as to the occurrences on that day, but the court denied him the right because the day was not specifically set out in the amended bill. This emphasized and made more grievous the error in refusing the complainant leave to amend her bill and set up the act of cruelty that occurred on that day. The rule for amending a sworn bill is stated in Nelson v. Randolph, 222 Ill. 531, as follows:

"While the bill was sworn to and the right to amend did not exist as a matter of course, still appellant presented amendments that appeared to be germane to the original bill together with an affidavit giving a reasonable excuse why such matter was not inserted in the first instance, which is all that is required under the practice to warrant the allowance of amendments to a sworn pleading when such allowance is necessary to make the pleading sufficient and in furtherance of justice." citing, Jones v. Kennicott, 83 Ill. 484; Campbell v. Powers, 129 Ill. 128; Cooney v. Booth Packing Co., 109 Ill. 370; Heuer Grocer Co. v. Zeile, 172 Ill. 47; Bilcher v. Schorik, 207 Ill. 526.

"If the allowance of the amendments would have made the bill one under which the appellants could have obtained the relief sought, or any equitable relief, the court should have allowed the amendments in furtherance of justice, and its refusal to do so is an abuse of the discretion which may be reviewed on appeal."

Equity favors amendments even on the hearing, provided they are not inconsistent with the original pleadings and do not entitle the complainant to a different sort of relief. (Patterson v. Johnson, 214 id. 481; Taylor v. Taylor, 259 id. 524).

At the close of the first day of the trial, by consent of counsel, at the suggestion or request of the trial judge, the parties to the bill went into the chambers of the judge where the judge endeavored to bring about a reconciliation. Before the trial was resumed the next morning, counsel for complainant asked the court to excuse the jury or allow him to make a motion in chambers not in the presence of the jury. The court, without excusing the jury, asked what the motion was, and complainant's counsel then stated that the motion was that a juror be withdrawn and the cause continued for a new trial before another judge. Counsel further asked that the jury be excused, but was directed by the judge to proceed, whereupon counsel stated that the motion was made because his client had informed him that by reason of what had occurred at the interview between the judge and the parties, complainant did not believe she could obtain a fair and impartial trial, and offered to put the complainant on the stand to testify as to the facts of the interview. The judge thereupon expressed his surprise that it should be claimed by any one that anything took place or could take place by reason of which complainant could not receive a fair trial, and stated: "I am frank to say in open court that I thought I did, so far as lay within my power, suggest to these young people a reconciliation. I suppose that the words,

'Blessed are the peacemakers for they shall get the worst of it,' applies to the court as well as to anybody else. The court knows in his own conscience, and this is a court of conscience, that nothing occurred at any time and nothing could occur at any time in talking to these two people * * * which would prevent him from giving a fair trial and for that reason the motion is denied."

This statement, in the presence of the jury, of what occurred in the chambers interview, after the case had been on hearing before them during the day and the testimony of the plaintiff had been delivered, tended to convey to the jury the impression that in the view of the court complainant had failed to make out her case, and that she ought not to litigate further but be reconciled to her husband. In other words, the jury, having been thus informed of the view the court took of the alleged acts of cruelty, might be led to take the view, and doubtless did take the view, that the actual cruelty shown by complainant's testimony was too trivial to become the basis for a divorce, and that the parties ought to become reconciled and live together as husband and wife. Juries ordinarily attach much importance to the remarks and opinions of the court. (111. Cent. R. & Co. v. Souders, 178 id. 585, 593), and hence it is important that no act of the court or expression of opinion of the court should be allowed to come to their knowledge regarding the merits of the controversy on trial before them. We regard the remarks of the court in this trial on review as more objectionable than the remarks of the court in the Souders case, supra. "It is error for the court to make any remarks indicating his opinion upon any facts necessary to be proved." (Andreas v. Petchen, 77 id. 377; Okelly v. Roland, 78 id. 438; Feinberg v. The People, 174 id. 609.

In his closing argument to the jury counsel for defendant, over objection by complainant, was allowed to comment on the action of complainant, during the selection of the jury, in excluding from the jury all jurors, except one, of a certain religious faith, naming it. This was error. That question was not before the jury for consideration.

For these errors in procedure the verdict and decree are reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

52 - 19660

GEORGE S⁸IEGFRIED,
Defendant in Error,

vs.

GEORGE FRITZE,
Plaintiff in Error.

FILED IN THE MUNICIPAL COURT
OF CHICAGO.

1911 A. 517

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out to reverse a judgment in forcible entry and detainer, in favor of the plaintiff, Siegfried, against the defendant, Fritze. Fritze became the tenant of a six room flat belonging to Siegfried in October, 1911. When or before the tenancy began Fritze paid two dollars to Siegfried and took a receipt, which when introduced in evidence ran:

"Chicago, October 14, 1911.
Received of G. F. Fritze Two Dollars to apply
on November 1911 rent for 1st flat at 3423 Perry St., rental
to be at the rate of \$20 per month for the year. To be put
in first-class repair as agreed.

Geo. Siegfried."

In our opinion this is only a receipt, not a lease which must be assumed to contain all the conditions of the renting.

The plaintiff says that the condition of the tenancy was that the rent of \$20 should be payable in advance on the first of the month; that he told the defendant so when he called to rent the flat, and that for three or four months the defendant paid the rent in advance.

The defendant denies that there was anything said about payment in advance, and that therefore the rent

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was not payable until the end of the month. He introduced himself several receipts, however, which showed that he did not wait until the end of the month before paying.

The trial Judge, sitting without a jury, was at liberty to believe, and evidently did believe, the plaintiff's statement that the rent was payable in advance. If it were, then no matter how much delinquency had been theretofore shown, the defendant, under the evidence, owed on June 4, 1913, \$40 for two months' rent - \$20 for May and \$20 for June. Siegfried gave him on that day a statutory five days' notice to pay the \$40 or quit. Fritze on June 9th offered to pay \$20 but no more, insisting that this was all that was due. Siegfried declined to receive anything less than the \$40, and brought suit.

The Court found for the plaintiff, as he was obliged to do if he believed him rather than the defendant. We see no reason to interfere with the judgment. It is affirmed.

AFFIRMED.

415 - 19817

MARK BURNS and JOHN BARNES,
Appellants,

vs.

JENNIE MYERS and LOUIS E. McCOSTA,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

191 I.A. 518

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This appeal is an attempt to reverse a decree of the Superior Court of Cook County dismissing for want of equity the bill in chancery of the appellants seeking primarily to subject certain real estate, the title to which was in defendants, to the payment of certain claims allowed by the Probate Court of Cook County in favor of the appellants severally against the estate of Herman H. Myers, the deceased husband of one of the appellees and the father-in-law of the other.

The claim of the appellant (complainant below), Mark Burns, was for \$2000, and that of the other complainant and appellant, John Barnes, was for \$4000.

Certain other incidental or collateral relief within the general purposes of a creditor's bill of this kind was prayed, but to justify any relief it would have been necessary, first, to hold that one or more of certain pieces of real estate specifically named in the bill had been, either before or after the death of Herman H. Myers, improperly and in fraud of the complainants, transferred from Herman H. Myers' hands or estate into those of one of the defendants, or that such piece or pieces, although in reality beneficially belonging to Herman H. Myers, had been originally placed, through his procurement, in the name of one of the defendants without

consideration and with a fraudulent intention of hindering and delaying his creditors.

The counsel for the parties in the argument of the case have in the interest of brevity used arbitrary symbols (letters of the alphabet) to signify the pieces of real estate involved, and we shall do the same. All of them are situated in Cook County.

The evidence bearing on the contentions of the complainants shows that January 18, 1904, Burns loaned Herman Myers \$2000 and took a note for that amount. This note was the basis of the Probate Court judgment before named. At that time Herman Myers owed Barnes some money which, however, was paid in August, 1905. The Probate Court judgment allowing a claim in favor of Barnes was based on money loaned subsequently to that time - in March and April, 1906, - and evidenced by notes dated in those months.

It would appear that at that time (January 18, 1904) Herman Myers was in no business, but had an interest or stock in a corporation known as the Illinois Mosaic Tile Company, and certain pieces of real estate, which may be designated as A., B., C., D. and E. It is shown by the evidence that besides the debts he then owed Burns and Barnes, he owed to one Leopold Apple \$3000 for money borrowed, and to the Drovers Deposit National Bank about \$2300 on direct obligations, and \$2000 more, for which he was contingently liable as endorser, his obligations to the bank probably being connected with the business of the Illinois Mosaic Tile Company. This would make \$9300 in all shown by the evidence to be his indebtedness, if we disregard the amount (left entirely indefinite by the testimony) then due Barnes and afterwards paid.

Between that time and August 29, 1904, an analysis of the evidence, including the Drovers Bank account, would

seem to show that Myers had decreased his direct liabilities also and increased his contingent liabilities by endorsements and discounts of the Tile Company's notes and of those of others apparently connected with it, to about \$4800. His liabilities direct and contingent therefore amounted to \$12,000.

This date of August 29, 1904, we single out because a transaction of that day by Myers is the first attacked in this litigation. On that day Myers increased his contingent liabilities by \$1500 by the discount at the Bank of a note of William Parsons or to which William Parsons was a party, and conveyed through John Barnes, (one of the complainants herein) to his wife Jennie Myers as a gift the piece of real estate D. This piece of real estate (D) is one of those which the bill attempts to subject to the payment of the complainants' claims.

A week or two before, in the earlier part of August, 1904, Myers had sold C. for \$1000 and 133 shares of street railway stock, which stock he sold in February, 1905, for \$14,000. Besides this stock and presumably this cash, amounting to \$15000, Myers had the pieces of real estate A., B. and C. each encumbered, but the equity in each of which, the evidence tends to show, was properly valued as follows, naming the lowest prices indicated by any of the witnesses:

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| A. | \$5000. |
| B. | 3500. |
| C. | <u>3500.</u> |

Total, \$17000.

We think the evidence in the record as it stands therefore fairly establishes the fact that Myers was not by any means insolvent when he conveyed D. without consideration to his wife, and that he might, moreover, in good faith have believed that he was retaining property to the value of at

least \$32,000 to protect indebtedness which, direct and contingent together, did not amount to much more than \$12,000. But this is not all. Myers must have been interested in the Illinois Mosaic Tile Co. Subsequently that Company went into bankruptcy owing him money, but at the time he made this conveyance to his wife, if he is to be charged with the knowledge or belief that his contingent indebtedness was equivalent to a direct liability, he may at least be credited with the belief that his interest in the assets and business of the Company, or its indebtedness to him, was worth something. Subsequent events and his increasingly pledging thereafter his credit and making contributions to the business, would indicate that he had faith in it. As a matter of fact, further analysis of the Myers account with the Drovers National Bank shows that all of the notes but one on which he was liable in August, 1904, were eventually finally paid (by which we mean that they were not renewed) long before Myers' death - most of them in the early part of 1905.

The notes on which Myers was liable to the Drovers National Bank which were outstanding at his death were of a later date than August, 1904, and were not renewals of those then in existence.

Anticipatory knowledge of the subsequent failure of the Company cannot be imputed to Myers to render his gift to his wife in 1904 invalid or objectionable.

Certainly it cannot be maintained that the conveyance was invalid because it left Myers insolvent, for there is no evidence that it did. And in the absence of such evidence, a gift of Myers to his wife will not be adjudged voidable even as against Burns, who is the only one of the complainants who can claim to have been a pre-existing creditor.

Bridgeford v. Middell, 59 Ill., 261;

Bittinger v. Masten, 111 Ill., 260;

James v. Dorsett, 147 Ill., 540.

We know that the appellants insist that this statement is too broad; that as against pre-existing creditors the rule is that such a conveyance will be held invalid unless the grantor is pecuniarily able to withdraw the amount of his donation from his estate "without the least hazard to his creditors", and the opinion of the Court in Emerson v. Bemis, 69 Ill. 337, is quoted to this effect. This phrasing is taken in that opinion from Ripp v. Hanna, 2 Bland (Md.) 33, and can hardly be considered in view of the Illinois cases which we have cited to express the law of this State with exactness. In Emerson v. Bemis the Court also said, referring to the facts of that case, that after the questioned conveyance was made "there may be said to have been essentially nothing left for the satisfaction of the claims of creditors."

But with still greater emphasis the contention is made that insolvency is not necessary to show a conveyance of this kind fraudulent and voidable, - that not only against pre-existing but even as against subsequent creditors it is voidable if made with the fraudulent intent to hinder and delay them, and that in the case at bar this intent is proven, if not by the insufficient protection left creditors, then by the express statements of Myers prior and subsequent to executing the conveyance in question. It is undoubtedly true that if such a fraudulent intent is shown by or can be properly inferred from competent evidence presented, a conveyance can be set aside. Insolvency in such a case may be only one of circumstances from which the intent may be inferred; and absence of insolvency may not be an irrefutable argument against it. But it is certainly, in a case like this, a strong argument against it, and apart from the compe-

THE UNIVERSITY OF CHICAGO

THE DIVISION OF THE PHYSICAL SCIENCES

DEPARTMENT OF CHEMISTRY

RECEIVED JANUARY 10, 1955

MEMORANDUM FOR THE RECORD
SUBJECT: [Illegible]
[Illegible text follows, appearing to be a summary of a report or experiment.]

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tency of the testimony of Barnes and Parsons to conversations before and after the conveyance of August 29, 1904, which is a matter of the very gravest doubt, the testimony itself to our minds falls short of proof of any such intent.

Barnes, who is a party complainant because of Myers' indebtedness arising through Barnes' voluntary loan to him long after he, Barnes, had known of and was the instrument through which the conveyance was made, says that before the conveyance Myers said he was "afraid of obligations to the Tile Co. and he was afraid they would make trouble for him and that he had a moral right to protect his family." Even if we must give implicit faith to the exact words of a conversation like this eight years before, it does not seem the statement of an intent to hinder or delay complainants or others as creditors; but rather, under the circumstances, as the defendants say, an expression of a desire - not blame-worthy - before going into a hazardous investment or liability, to make his family safer. The conveyance was not a secret one and there is nothing from which it can be inferred that any credit was thereafter sought on account of property which had been put beyond reach of his creditors. But we can hardly assent to the view that this conversation was precisely that which is given. Everything shows that Barnes, who was then a creditor of Myers, (for an indebtedness subsequently paid; did not consider it an attempt to hinder creditors generally, and also that Myers was not under obligations to the Mosaic Tile Co. but for the Mosaic Tile Co., and that the Tile Company owed him, not he the Tile Company. And as a matter of fact, the analysis of the Bank account heretofore alluded to shows that before Myers' death every note connected with the Tile Co. which was outstanding on August 29, 1904, except one of \$800, was finally paid - many after several renewals, it is true.

It was, with this one exception, entirely new notes, not renewals of old ones, which were outstanding obligations of Myers at his death. We have no statements or evidence which gives a complete or adequate view of Myers' relations to the Tile Company, but the matters we have mentioned do appear.

Parsons' testimony of a conversation held with Myers in January, 1905, is even less to the point, for as reported it is more definitely a statement that the conveyance was to protect himself from the creditors of the Tile Company, and, as we have noted, these creditors of the Tile Company at the time he made the conveyance were paid before his death in every case but one.

We do not think, therefore, that the Master or the Chancellor was wrong in holding "that the deed from Herman H. Myers and wife to John Barnes and from Barnes to Jennie Myers vested the title to the premises therein described" (B) "in Jennie Myers free and clear of any right or claim of the complainants." Nor do we think that this right of Mrs. Myers was affected by the fact that her husband afterward acted for her in the collection of rents or that such income was mingled with his own money in his bank account.

The next matter complained of by the bill was the placing by Myers of real property purchased by him on Feb. 16, 1905, in his wife's name. The transaction was this: February 16, 1905, Myers made a contract with a man named Bane to sell him certain lots (F) for \$12,000, and in the carrying out of the agreement Bane on the same day made a deed of F. to a man named Bland, who was a mere dummy in the transaction, and received \$10 for his participation in it. Bland, holding the title, made a mortgage trust deed on F. to secure eight notes of \$5000 each, also made by him. He then by deed

dated, acknowledged and recorded on February 17, 1905, deeded the property F. to Jennie Myers, subject to the mortgage. Louis DeCosta, one of the defendants, was just about to become the son-in-law of Myers. On Feb. 16, 1905, Myers borrowed \$30,000 from DeCosta and gave him a note for that amount. Later Myers gave him four of the secured Bland notes for \$5000 each as collateral. Later still Myers borrowed \$3500 more from DeCosta, and obtaining one of the Bland notes which he had pledged to DeCosta, on the security of that and the four other Bland notes, in the aggregate \$25,000, borrowed \$25,500 from the Drovers Trust & Savings Bank. Meanwhile, either as the agent of his wife, ^{as} appellee contend, or otherwise, he built on the property F., which when he bought it for his wife was bare, a fire having just destroyed the buildings which had been upon it.

While Myers was alive he collected the rents from the property and the family income seems all to have gone into the same general fund. After his death DeCosta, having a claim against the estate of \$23,500 and interest for money loaned Myers, secured by the Bland notes for \$15000, with a view to protection against adverse foreclosure, as it may be assumed, took up the Myers indebtedness of \$25,500 at the Drovers Trust and Savings Bank, and received the Bland notes held by it as collateral security to the amount of \$25,000. DeCosta thus had in claims against the estate of Myers a claim for principal and interest of money loaned by him directly to Myers which had been allowed for the sum of \$25,836.00, and the claim of the Drovers Trust & Savings Bank for \$25,500, and he held as security the \$40,000 of Bland notes secured by trust deed on F. October 25, 1905. Mrs. Myers deeded her equity in F. to DeCosta in cancellation

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of this indebtedness and mortgage. How much it was worth there is nothing in the evidence to show, except the statement of DeCosta that forty-five thousand dollars would be a good price for the property; that he has offered it at that price without a taker and can get no better offer than forty-two thousand five hundred dollars for it.

We cannot see any good foundation in this situation for the contention made by the complainants that this property F. should be subjected either wholly or partly to the payment of their indebtedness from Mr. Myers' estate. There was nothing secret or fraudulent about these transactions from the beginning. On its face the original purchase by Myers would appear to have been a speculation or business enterprise entered upon for his wife, he acting as her agent in buying and improving a piece of property. It was distinct from any business he was carrying on in connection with the Tile Company, and there is nothing to suggest that it or its results were in any manner put forward as a means of securing the credit which either of the complainants at any time gave him.

Mr. DeCosta put his money into the property to a large amount and apparently in perfect good faith and is still a loser. There is no reason it should be taken from him in whole or in part. His being a son-in-law of Myers makes his position neither better nor worse. It may be suggested, however, that possibly had the property not been in Mrs. Myers' name, rather than in her husband's, he might not have risked his original investment.

The ground for maintaining, however, that Myers entering into this transaction in Mrs. Myers' name and in her behalf, rather than in his own, shows a fraudulent intent, is found by the complainants in the absorption, which they think

the first of these is the fact that the number of cases of the disease is increasing. This is due to the fact that the disease is becoming more common in the population. The second is the fact that the disease is becoming more severe. This is due to the fact that the disease is becoming more common in the population.

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The twenty-eighth is the fact that the disease is becoming more common in the population.

The twenty-ninth is the fact that the disease is becoming more common in the population.

The thirtieth is the fact that the disease is becoming more common in the population.

is justified by the evidence, that Myers took a large part of the assets which he had remaining after he conveyed B. to his wife and made with them the \$12000 purchase of the property Y., which he also placed in his wife's name. The two transactions taken together, they say, show the fraudulent intent which they allege. Leaving the question whether this action could be so construed if the evidence showed such a disposition of such assets, we are not of the opinion that it does. The complainants rely on this fact: February 7, 1905, Myers sold the 133 shares of street railway stock of which we have before spoken, and received \$14000 therefor. February 16, 1905, nine days later, he purchased F. for his wife and paid \$12000 for it. This would tend to substantiate the inference which the complainants draw from it, except for other facts. Those facts are that on February 16 itself, he borrowed and received \$20,000 from DeCosta; that after the building was placed on the land, building and land together were not worth so much as the money which he borrowed on account of them, including this \$20,000, and (which is not noticed by either party in argument) that on February 7, 1905, the date of his receipt of money for the railway stock, he finally paid (not renewed) \$4000 of the Title Company notes on which he was liable, and on February 9, 1905, \$900 more. A portion at least of this \$14,000, reducing it much below \$12,000, undoubtedly therefore went to swell the final loss which the Title Company enterprise involved him in. Perhaps if we had in the record (which we have not, despite the recital Rec. p. 443) the defendant's exhibits 43 to 102, it might be found that other amounts might thus be traced between February 7 and February 17.

We think that as to this piece of real estate F. also, the Master and Chancellor were right in their holding

that the deed from Jennie Myers to De Costa dated October 24, 1908, vested the title to the premises described (2) in said DeCosta free and clear of any right or claim of the complainants.

The third and last contention of the appellants to be considered is that a judicial sale to DeCosta under the order of the Probate Court of Cook County, and confirmed by the Probate Court of Cook County, of the equities in A., B. and C., the pieces of real estate remaining in Myers' name and estate at his death, was "colorable", "fraudulently designed to vest title to said premises in said DeCosta for the purpose of defrauding the complainants and other creditors of Myers", etc., and that it was really a sale to Jennie Myers herself, and therefore void.

It is true that the amount which the equities in these properties realized, \$3500, was not their full value even with the dower outstanding, if the uncontradicted testimony which we have before in this opinion indicated we must consider conclusive, is correct; but inadequacy of price is not infrequently associated with judicial sales, especially of property subject to mortgage and dower claims. We can see nothing in the sale itself even suggesting a suspicion of the good faith of the parties as to this sale. It was open - and regular. The claim of DeCosta was a just one. He was looking out for his interests; the other claimants in the Probate Court had the opportunity of protecting theirs. If the property sold were worth more than it brought, they, having at least constructive notice which they could have made actual notice if they were watching the administration of the estate, might have bid higher or opposed the confirmation of the sale. They did nothing. That DeCosta was a son-in-law and that being a son-in-law he afterward acted with generosity either to his mother-

in-law or to one of the unfortunate creditors of his deceased father-in-law, is not material in this controversy.

It follows that the remaining material finding of the Master and the Chancellor, that the deed from Jennie Myers as executrix to said DeCosta, dated June 11, 1908, conveyed the premises (A., B. and C.) subject to the dower rights of Jennie Myers, but free from any claims of complainants, is also correct, and that the decree dismissing the complainants' bill for want of equity is without error. It is affirmed.

APPROVED.

H. H. LUND,
Plaintiff in Error,

vs.

A. H. ZIMMERMANN, Individually
and as Trustee,
Defendant in Error.

BRANCH TO MUNICIPAL
COURT OF CHICAGO.

191 I.A. 541

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of nil capiat in an action tried by the Court, in which plaintiff in error Lund was plaintiff and defendant in error Zimmermann was defendant.

The Hildebrandt Fuel Company was in financial trouble. Hildebrandt, Jr., was president and manager of the Company, and he, his father and McAuliff were its directors. The lease of the yard occupied by the Company was made by the landlord to Hildebrandt, Jr. March 1, 1913, the following instrument was executed by Hildebrandt, Jr. in the name of the Company and individually and delivered to Zimmermann:

"For and in consideration of One Dollar and other good and valuable consideration, to me in hand paid, the receipt whereof is hereby acknowledged, we do hereby sell, assign and transfer unto A. H. Zimmermann all the assets of the H. Hildebrandt Fuel Company, consisting of accounts receivable and all horses and wagons, all tools and machinery, all wood and lumber in yard and all personal property of the said H. Hildebrandt Fuel Co. and interest we have in a certain lease of the premises known as #3340 St. Paul Ave., said assignment being subject to the approval of the creditors of H. Hildebrandt Fuel Co. Witness our hands and seals this 1st day of March, A. D. 1913, H. Hildebrandt Fuel Co. (Seal) H. A. Hildebrandt, Jr. (seal)."

More than seventy-five per cent. in amount of the creditors of the Company consented to such assignment. It does not clearly appear whether Zimmermann took formal possession of the property assigned to him. He

and Lund went to the yard and examined and checked over the property. Lund was especially desirous to secure the lease of the yard and told Zimmermann that he had arranged with the landlord to get the lease if they could get Hildebrandt out of the yard. Lund made an offer of \$800 for the property assigned to Zimmermann, who reported the offer to Hildebrandt, Jr., who apparently consented to the sale and promised to have the horses at the yard the next day. Later Hildebrandt, Jr. and Gilmartin made an offer to Zimmermann of \$800 for the property, but Lund insisted that he had bought it and threatened to sue Zimmermann if he did not get it. Zimmermann finally consented to sell to Lund the interest he had acquired under the assignment, and a meeting of Zimmermann, Lund and Roberts, Lund's attorney, was arranged for March 18. On that day Zimmermann presented the draft of an instrument and the matter was fully discussed. Roberts, Lund's attorney, told Lund that if he made the purchase he was buying a "cat in a bag". The instrument, after certain changes suggested by Roberts had been made, was signed by Zimmermann and together with the lease of the yard delivered to Lund, and Lund paid Zimmermann \$800.00. The instrument is as follows:

"Chicago, Mar. 18, 1913. In consideration of the sum of eight hundred dollars (\$800) in cash to me in hand paid, I hereby sell, transfer and assign all interest I now have or may have as Trustee or otherwise given to me under an assignment made by one H. Hildebrandt, Jr., on behalf of the H. Hildebrandt Fuel Company, and dated March 1st, 1913, and approved by the creditors of the said H. Hildebrandt Fuel Company; to all the property of the said Company, to one A. B. Lund. It is, however, understood that I do not in any way represent or warrant that I have perfect title in said property, or that I can deliver perfect title or possession of same, except as is shown in the above named instruments, and the purchaser, A. B. Lund, hereby assumes all risks of loss and damage of any kind, nature or description. And it is further agreed that the only effect of this assignment is to transfer whatever title I now have or may have without question of legality or without any warranty on my part whatsoever. Witness my hand and seal this 18th day of March, A. D. 1913."

A few days later the Hilcebrandt Company filed a voluntary petition in bankruptcy, and April 4 this suit was brought.

There was on the part of Zimmermann neither a warranty nor a fraudulent misrepresentation. On the contrary, the instrument sued on in terms states that Zimmermann does not warrant or represent that he has title to the property, and that the only effect of the instrument was to transfer to Lund whatever title he had, and Lund expressly assumed all risk of loss.

We do not think that the facts of this case bring it within the rule that a sale of personal property in the adverse possession of another is void. To permit Lund to recover in this case would be to permit him to rescind his contract in a case where no fraud or misrepresentation on the part of the other party to the contract is even charged.

We think that the Court properly gave judgment for the defendant.

The motion of defendant in error to strike from the record the "correct statement of facts" is denied and the judgment affirmed.

MOTION TO STRIKE DENIED
AND JUDGMENT AFFIRMED.

19 - 20008

THE A. M. ANDREWS COMPANY,
a corporation,

Defendant in Error.

vs.

C. F. LAUTENSCHLAGER,

Plaintiff in Error.

BROCK TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 543

MR. JUSTICE BARRE DELIVERED THE OPINION OF THE COURT.

The plaintiff, A. M. Andrews Company, brought an action in the Municipal Court against defendant Lautenschlager to recover damages for the breach of the following instrument:

"This Agreement made the 11th day of April, 1912, between the A. M. Andrews Company, a corporation, * * * party of the first part, and C. F. Lautenschlager of Chicago, Ill., party of the second part, WITNESSETH:

Party of the second part purchases and orders from first party the following described seating, viz:

650 No. 217 (more or less, according to plan)

at 1.61½

\$1.45 per setting * * *

the specifications for which will be found on pages 3 and 4 of this contract, and it is expressly agreed that said specifications are and shall be considered a part of these presents.

Party of the second part further agrees to pay to the said The A. M. Andrews Company for said seating at the above prices per item, or as a whole, as stated, on the following terms, viz: Cash down, \$200, and \$100 July 1st, and \$100 July 15, and \$150 August 15, and \$50 Sept. 15, and \$100 Oct. 15, and \$200 Nov. 15, and \$205 December 30, all in the year of (1912) secured by notes and chattel mortgages.

Party of the first part agrees to manufacture, transport, deliver and set up ready for use in Grand Theatre at 3433-35 North Ave., on or about the 15th day of June, 1912, at its own risk, and in accordance with plan or diagram to be furnished by party of the second part, as hereinafter specified, all the seating herein set forth. Said seating shall be consigned to the second party, who shall receive same and pay such charges as shall have accrued for transportation, said charges to be deducted by second party from its cash remittance, and all expense bills to be returned as vouchers to the first party with said remittances.

* * *

Party of the second part agrees to furnish an approved seating plan at least forty days before the date mentioned in this contract for shipment, and any failure of said second party so to furnish said approved seating plan shall release the party of the first part from its obliga-

tion to furnish the seating at the time specified in this contract. If the architect of the building for which said seating is ordered shall furnish said seating plan, it is hereby mutually agreed that said plan shall be considered the approved plan of second party, and shall be binding on said second party as such approved plan. Said approved plan shall govern in all respects the number, size and arrangement of chairs to be furnished under this contract.

It is thoroughly understood and agreed by the party of the second part that the submission of a seating plan according to this contract to the party of the second part by the party of the first part shall not be construed by the party of the second part as an acceptance of this contract by the party of the first part.

It is expressly understood and agreed that any verbal statements or agreements not incorporated in this agreement shall not be binding on either party, and this agreement shall supersede all previous proposals.

This contract is made subject to the approval of the party of the first part, and shall not be binding upon the party of the first part unless and until it shall have been passed upon and accepted by an officer of the corporation.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

THE A. H. ANDREWS CO.
By W. A. Bishop (Seal)
E. F. Lautenschlager (Seal)

(Page 3)

SHIPPING DIRECTIONS AND SPECIFICATIONS.

Consignee
N. H. Station
Name and Local Address of Building 3433-35 North Ave.
Address Invoice and Correspondence to
By Wagon N. H. on or about June 15th, 1912.
All chairs in this contract to be gloss finish, unless otherwise specified.

| SPECIFICATIONS. | Location |
|---------------------------------------|----------------------|
| | Main Floor |
| | Style No. 217 |
| Approximate number of chairs | 650 |
| Woods (kind) | Birch |
| Finish of woods (color, etc.) | Per sample |
| Color of castings | " " |
| Arm rests (No.) | #4 |
| Back (description) | Heavy 5 Ply |
| Seat (description) | Thin 5 Ply Full Roll |
| Veneers | Regular |
| Hat racks-needed? | To each chair 650 |
| Foot rests-needed? | " " " |
| Number plates | " " " |
| Method of numbering | Per Plan |
| Bookracks-how many? | X |
| Upholstering, material, color & kind, | X |

| | | |
|--------------------------------|--------|--|
| Of what material is floor? | Cement | What extra charge for cement, marble, etc. No. |
| Number of aisles and width | | Per plan |
| Average width chairs preferred | | " " |
| Desired spacing between rows | | " " |
| (Level? No | | |
| Floor (Inclined? Yes | | |
| (Steeped? No | | Nickel head bolts |

(Page 4)

Any variations or change from regular style of chair must be fully specified hereon. When plan is not to be furnished, salesman must give number of rows wanted, number of chairs in row, and width of chairs.

Understood that we are to buy back approx. 16
\$1.35

chairs at ~~\$1.25~~ per chair, all chairs to be in first class condition.

(Sgd) The A. H. Andrews Co.
W. A. Bishop."

The jury found a verdict for the plaintiff for \$549.62 damages, and to reverse the judgment on the verdict this writ of error is prosecuted by defendant Lautenschlager. The plaintiff in error contends that the instrument sued on is not the contract of the parties. From the evidence the jury might properly find that just after the instrument was signed by Bishop as salesman of the plaintiff and by defendant, they exhibited it to Merle, the secretary and general manager of the plaintiff Company, and that Merle told defendant that he accepted the contract. The instrument in effect provides that the passing on and acceptance of the contract by an officer of the corporation shall be an approval of it by the corporation, and the jury might from the evidence properly find that the instrument was passed on and accepted by Merle, an officer of the corporation. Such passing on and approval of the instrument were sufficient to make it the contract of the parties, and it was not necessary that the approval by an officer of the corporation should be in writing.

The plaintiff in error further contends that the contract was void for uncertainty because it provides

ber of chairs, and the exact number could only be ascertained when plans for the seating of the theatre were prepared. By the terms of the contract Lautenschlager was to furnish the seating plan within a given time and failed to do so. Such failure was a breach on his part of a provision of the contract, and he cannot be heard to say that because of such breach the contract became void for uncertainty. The contract provided for the furnishing of an approximate number of chairs and the recovery is based on a less number of chairs than the approximate number agreed on, and we do not regard the contract as void for uncertainty.

Minn. Lumber Co. v. Coal Co., 16 Ill. 85;

Chicago v. Galpin, 183 Id. 399;

Becker Co. v. Hess Co., 136 Fed. 647.

Two days after the instrument was signed Lautenschlager went to plaintiff's office for the purpose, as he testified, of cancelling the contract. With him was the representative of a rival seating concern, but that fact was not disclosed to plaintiff. Lautenschlager complained to Merle that the prices named in the instrument were too high. Merle consented to a reduction of the price of the chairs from \$1.70 to \$1.61½ "per setting" and to an increase of the price of the 16 chairs which plaintiff was to take back from defendant from \$1.00 to \$1.35 per chair, and Merle drew his pen through the original figures and wrote in the figures above named. Lautenschlager then, on the suggestion of the man who came with him that the contract had been changed and was void, refused to "S. P." the changes so made in the instrument, and left plaintiff's office, saying that he would have to see his father before indicating by his initials his consent to the changes, and now contends that by such alteration in the instrument the same was altered and either

made void or as modified because the contract of the parties and that the recovery must be made on the contract as so altered and modified. We think that the jury might from the evidence properly find that Lautenschlager at no time intended to consent to a modification of the contract, but intended to make the changes made in the instrument by Serle an excuse for cancelling the instrument. We are also of the opinion that the evidence fails to show any mutilation of the instrument, but the proposed alteration was innocent, made with the consent of Lautenschlager and only failed to become a modification of the instrument because of his refusal to ratify the alteration after it was made, and that the recovery should be had on the original obligation.

Hayes v. Wagner, 320 Ill. 256.

Plaintiff in error further contends that the damages are excessive because if a plan of circular seating had been adopted a less number of seats could have been placed in the theatre than 648, the number on which the recovery is based. The contract does not provide for a circular plan of seating. Lautenschlager furnished no seating plan and the plan furnished by plaintiff provided for 648 seats. We think the jury might take that number as the basis for estimating plaintiff's damages and that the damages cannot be held excessive.

We think the record is free from error, and the judgment is affirmed.

REPEATED.

ALEXANDER LIPS and BENJAMIN F.
MYSEWANDER, Jr., by J. L.
MYSEWANDER, his next friend,
Plaintiffs in Error.

vs.

ANTON J. CERMAK and ANNA L.
McCOLD,
Defendants in Error.

APPEAL TO THE JUDICIAL
COURT OF CHICAGO.

191 I.A. 546

MR. JUSTICE SAKER DELIVERED THE OPINION OF THE COURT.

The action in which the judgment was rendered which this writ of error is prosecuted to reverse was one of trial of the right of property in an automobile, brought in the Municipal Court by Lips and Benjamin Mysewander, Jr., claimants, against Anton J. Cermak and Anna L. McCold, defendants, in which there was a judgment for the defendants. The machine was taken by Cermak as bailiff of the Municipal Court on an execution issued on a judgment in favor of Anna L. McCold against Benjamin Mysewander, Jr., the father of the claimant Benjamin Mysewander, Jr. Benjamin Mysewander, Jr., acting for Lips, traded certain real estate of Lips for the automobile in question, which was delivered to him and remained in his possession until levied on by Cermak as above stated. The only interest he had in the machine was his claim for his services in negotiating the exchange. Mysewander, Jr., the judgment debtor, had no interest whatever in the automobile. The evidence for the claimants tended to prove the facts above stated. The only evidence offered by the defendants was the files in a suit in replevin in the Municipal Court to recover possession of said automobile, in which Lips was plaintiff and

Cermak and McCoid were defendants, and what was treated by the Court as a judgment for the defendants in that case, which is as follows:

"July 2/13. Rooney. Tr. by Ct. findg. right prop. in repn. not in plff. Judg. for lefts in repn. reto nab & C. Bd. 11000."

The Court found in favor of the defendants on the ground that the judgment in the replevin suit was a bar to the action. In this we think the Court erred; first, because the so-called record of a judgment in the replevin suit is no evidence of a judgment in that suit. Stein v. Myer, 253 Ill. 204; and, second, because a judgment in the replevin suit would not be a bar to the present action.

Whether the claimants on the evidence in the record can maintain a joint action of trial of the right of property, is a question not passed on by the trial Court and on which we express no opinion.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ALEXANDER LIPS and BENJAMIN
F. HYSEWANDER, Jr., by J. L.
HYSEWANDER, his next friend,
Plaintiffs in Error,

vs.

ANTON J. CERNAK and ANNA L. MCCOID,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

Reversed on rehearing 191 I.A. 546

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error brought replevin against the defendants in error in the Municipal Court to recover the possession of an automobile. Plaintiff Hysewander testified that he took the machine from his co-plaintiff Lips to sell for him, and that he, Hysewander, had no claim on the machine.

The evidence shows no joint right of possession or property in the automobile. The action was by joint plaintiffs, and to recover they were bound to show a joint right of possession or ownership.

- ✓ *St. Louis, A. & T. H.* 37 300
E. R. Co. v. Linder, 39 Ill. 433;
- ✓ *1915* Brady v. Koontz, 145 Ill. App. 582;
- ✓ *107* Cottingham v. Armour Co., 100 Ala. 421.

The Court properly gave judgment against the plaintiffs, and the judgment is affirmed.

AFFIRMED.

RECEIVED BY THE SECRETARY OF THE
NAVY DEPARTMENT
WASHINGTON, D. C.
JANUARY 10, 1900

TO THE SECRETARY OF THE NAVY
FROM THE SECRETARY OF THE ARMY

Subject: *Report of the Secretary of the Army*

Enclosed for the Secretary of the Navy are the following documents:

1. Report of the Secretary of the Army, dated January 10, 1900.

2. Report of the Secretary of the Army, dated January 10, 1900.

3. Report of the Secretary of the Army, dated January 10, 1900.

4. Report of the Secretary of the Army, dated January 10, 1900.

Very respectfully,
The Secretary of the Army

Enclosed for the Secretary of the Navy are the following documents:

1. Report of the Secretary of the Army, dated January 10, 1900.

2. Report of the Secretary of the Army, dated January 10, 1900.

3. Report of the Secretary of the Army, dated January 10, 1900.

Very respectfully,
The Secretary of the Army

HARRY ROWAN,
Defendant in Error,

vs.

WALTER S. BARK,
Plaintiff in Error.

IN THE MUNICIPAL COURT
OF CHICAGO.

191 I.A. 547

MR. JUSTICE BARKER DELIVERED THE OPINION OF THE COURT.

In tort for damages for assault and battery the jury found the defendant guilty, assessed plaintiff's damages at \$300, the Court denied defendant's motion for a new trial and the defendant prosecutes this writ of error to reverse the judgment on the verdict.

We think that from the evidence the jury might properly find the defendant guilty and that the damages awarded cannot be held excessive.

Conceding that the file, which was not found until two days after the assault and was not shown to have been used by the defendant, should not have been admitted in evidence, we do not think that because of the admission of the file in evidence the judgment should be reversed. If the file had been excluded, the jury might still have properly found from the evidence that the defendant struck the plaintiff on the head with some instrument and thereby inflicted the injuries complained of.

The instructions are not free from error, but we do not think that the errors are such as to warrant or justify a reversal of the judgment, and it is affirmed.

APPEAL.

JOSIAN BURNHAM,
Defendant in Error,

vs.

WILLIS F. DICKINSON,
Plaintiff in Error.

APPEAL TO MUNICIPAL COURT
OF CHICAGO.

1911 A. 553

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment for \$200 recovered by plaintiff Burnham, a lawyer, in the Municipal Court against defendant Dickinson for legal services rendered in prosecuting a writ of error in this Court to reverse a judgment recovered by O'Brien against the Concord Apartment House Company and in prosecuting an appeal in that case from the judgment of this Court to the Supreme Court.

The contentions of Dickinson are, first, that the services in question were rendered for the Concord Company, that he did not employ Burnham to render such services nor promise to pay him therefor; and, second, that the last services were rendered more than five years before the suit was brought and the action was therefore barred by the statute of limitations. The testimony was conflicting, and we think that the finding of the Court that Dickinson did personally employ Burnham and promise to pay him, should not, on the evidence in the record, be disturbed.

Burnham testified that after the expiration of five years from the rendering of the last services, Dickinson said to him that he would pay him the balance of his account; "that he would pay me what was due me." This promise, if made, was sufficient to take the case out of the statute, and whether it was made was, on the evidence in the record, a question of fact for the Court, on which the finding must be

held conclusive.

The contention of the plaintiff in error that the claim of Burnham for the services in question was paid and discharged by Clancy is not sustained by the evidence. Burnham testified that he told Clancy when he made his last payment that he would let him off on payment of \$75.00, as he was only interested as a surety in the appeal bond, but he would not abate a penny from the amount of his bill; and the question whether this testimony was true or false was a question for the Court.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

238 - 20562

GEORGE L. WILLIAMS,
Appellee,

vs.

AGENTS ADJUSTMENT CO.,
(a corporation),
Appellant.

APPEAL FROM THE SUPERIOR COURT
OF COOK COUNTY.

1911A-560

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a decree requiring defendant to deliver to complainant two promissory notes made by complainant and one stay and enjoining defendant from disposing of or attempting to collect said notes or attempting to collect from the Boston Store under an assignment of complainant's wages to West & Co. or its assigns any earnings of complainant, and decreeing that said store be authorized to pay complainant his wages and not to pay any attention to or act upon any notice of the assignment of such wages.

The decree recites that the cause was heard on the bill, the answer and the proofs taken in court, the defendant not appearing by counsel or otherwise. The proofs heard were not preserved by a certificate of evidence or otherwise.

The contention of the appellant that the cause was heard on bill and answer and that the answer therefore must be taken as true, is without merit. The cause was treated as at issue and the filing of a replication was waived.

Jones v. Neely, 72 Ill. 449;
Chambers v. Brown, 36 id. 171;
Webb v. Ins. Co., 5 Gila. 223.

(51)

When the record does not show that a cause was formally set for hearing on bill and answer, and it was heard on bill, answer and proofs, the filing of a replication is waived.

Corbus v. Teed, 69 Ill. 205.

Defendant's attorney treated the cause as at issue, for after the hearing he gave notice that he would ask that the cause be set down for rehearing and for leave to introduce evidence for the defendant. A cause will be treated as heard on bill and answer only when the decree shows that it was so heard or the record shows that the defendant gave complainant notice of the filing of his answer.

When the replication is waived the findings of fact in the decree are taken as true, and if sufficient to support the decree, it will be affirmed. In this case the findings of fact are sufficient to support the decree and it is affirmed.

AFFIRMED.

CHARLES BRANDENBLEV,
Plaintiff in Error,

vs.

ANNA BRANDENBLEV,
Defendant in Error.

ERROR TO THE CIRCUIT COURT
OF COOK COUNTY.

1911 A. 562

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree dismissing for want of equity his bill for divorce on the ground of impotency. The only physical disability of the defendant is that her left hip joint is fixed and this condition existed at the time of the marriage. The Chancellor announced orally his conclusion that defendant had a capacity of sexual intercourse, but such intercourse would not be in the usual and natural way. The evidence for the defendant was to the effect that in order for the parties to have sexual intercourse it would be necessary for the complainant to turn his body to the left and for the defendant to incline her body to the right; that in such position it would be possible for them to have complete intercourse, but that defendant's condition would interfere with penetration in comparison with a normal case. The defendant testified that there were only three attempts at sexual intercourse; that there was not complete intercourse either the first or second time, but at the third attempt there was a flow of blood and a bursting of the hymen, but not complete penetration. Dr. Boyer testified that the hymen had been ruptured, but he could not tell the cause of such rupture nor how long it occurred before his examination;

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1. The first principle is that the government should not interfere with the free market.

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

[illegible]

Journal of Interpersonal Violence 26(12) 2301-2316
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DOI: 10.1177/0886260511419101

it might have been three months or three or six years.

The case is a very close one on the facts, but we cannot say that the Chancellor erred in dismissing the bill, and the decree is affirmed.

AFFIRMED.

THE UNIVERSITY OF CHICAGO PRESS

CHICAGO, ILLINOIS 60607-7090

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267 - 20593

SANITARY HAIR GOODS COMPANY,
a corporation,

Plaintiff in Error,

vs.

JOHN C. ELLIOTT,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1911 A. 563

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In April, 1908, the plaintiff corporation was engaged in making and selling hair rats or rolls, was the owner of certain patents for improvements in such articles and employed the defendant Elliott, a patent lawyer, to secure an injunction in the Federal Court restraining L. E. Renth and others from infringing complainant's patents and from "unfair trade." This action was brought by said corporation against Elliott in August, 1912, to recover \$1500 paid by plaintiff to defendant on the ground that defendant, "did so negligently, unfaithfully and fraudulently prosecute and conduct said suit that by reason thereof no injunction was ever obtained and plaintiff, supposing that defendant was acting in good faith, paid him fees amounting to \$1581.22; that defendant, after his retainer had been paid before the making of each of said other payments, falsely stated that the delay in obtaining a preliminary injunction was unavoidable, and fraudulently promised the plaintiff that if he would make said payments respectively he would obtain the desired relief within a reasonable time, whereas the defendant did not intend to obtain said relief, and the plaintiff, relying on said representations and promises, was deceived thereby and by reason thereof made said payments, but the defendant did not obtain such relief, but did so negligently and unfaithfully conduct said plain-

tiff's cause and by reason of such neglect and unfaithfulness plaintiff has suffered damage to the amount of \$10,000."

At the close of the plaintiff's case the Court, on motion of the defendant, directed a verdict for the defendant and this writ of error is prosecuted by the plaintiff to reverse the judgment on such verdict.

A motion for a preliminary injunction was denied October 13, 1908. It appears that this motion was heard on bill and affidavits, but neither the bill nor any affidavit is in the record, nor is there evidence in the record as to the manner in which the case was argued by Elliott in the Federal Court. All that is shown as to the proceedings before Judge Kohlssaat on the hearing of the motion is that the Judge asked Elliott if he relied on the charge or claim of "unfair competition", and Elliott said that he did not. We are unable to see in this occurrence any just ground for criticism of the manner in which Elliott conducted plaintiff's cause. "Unfair competition" is not a matter which gives the Federal Court jurisdiction. If there is an infringement of a patent, "unfair competition" may be shown as an element of damages; but the infringement must be shown to give the Court jurisdiction unless there is a diversity of citizenship. If, therefore, in case in the Federal Court the Court found against the complainant on the question of infringement, the bill could not be maintained on the ground of "unfair competition", and in such case the proper answer for Elliott to make to the question of the Court would be the one made by him.

Ill. Watch Co. v. Elgin Co., 94 Fed. 667,
179 U. S. 665.

The fact that Elliott acted as attorney for Regrescou in obtaining a patent, and that Regrescou was a competitor of plaintiff, is not material to the issues in this case, be-

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cause it does not appear that as a result Elliott took a step which he should not have taken or refrained from taking a step which he should have taken, and as a result thereof the interests of the plaintiff were prejudiced. Elliott was not employed by plaintiff to bring suit against Negrescou. He did voluntarily and in a friendly way attempt to persuade Negrescou to stop using the name of the plaintiff. There is no competent evidence that the roll manufactured by Negrescou was an infringement of the roll manufactured by plaintiff.

The controversy in this case relates to the good faith or fraudulent conduct of Elliott, and in such case in an action against the attorney the burden is on the plaintiff to prove the negligence or fraudulent conduct alleged.

"In a suit by a client against his attorney for damages charged to have resulted from the negligent management of business, the burden is on the plaintiff to prove the negligence charged. There is no presumption that an attorney has been guilty of want of care arising merely from his failure to be successful in an undertaking. On the contrary, he is always entitled to the benefit of the rule that every one is presumed to have discharged his duty, whether legal or moral, until the contrary is made to appear." *Friest v. Dodsworth*, 235 Ill. 613.

All that an attorney owes to his client is good faith and reasonable skill and diligence in the prosecution of a case entrusted to him. The only case in which Elliott was retained or paid money by plaintiff was the case of *Sanitary Hair Goods Co. v. Benth et al.*, and the evidence fails to show any fraudulent conduct, negligence or want of care, diligence or ability which prejudiced in any way the interest of the complainant in that cause.

We think that the Court properly directed a verdict for the defendant, and the judgment is affirmed.

AFFIRMED.

311 - 20640

HARRY W. CRAVEN, doing
business as The Hollister
Drug Co.,

Defendant in Error,

vs.

STONE STORE & OFFICE FIXTURE
CO.,

Plaintiff in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

1911 A. 566

Plaintiff Craven ordered of defendant at its store in Chicago certain second-hand store fixtures September 13, 1913, to be shipped to him at Twin Falls, Idaho. The price agreed on was \$105, and defendant said the goods would be shipped in a week. Plaintiff paid \$30 on account and either in November, 1913, or February, 1914, paid the remainder of the contract price on the statement of defendant that in order to have the American Forwarding Company take the goods in less than a car load lot at a rate below the railroad rate, the goods must be fully paid for. February 18, 1914, plaintiff called at the store of defendant and in answer to his inquiry was told that the goods had been shipped. He then stated to defendant that if the goods had not been shipped he did not want them and was again told that the goods had been shipped. He then asked for the invoice and a pretended search was made and it was said that it could not be found. He then directed that when the invoice was found it should be delivered to him at Evanston at an address which he gave. It is admitted that the goods had not at that time been shipped and that they were delivered to the American Forwarding Co. the next day. February 29 plaintiff went to the defendant's store, asked for the invoice and was told that it had been mailed to



and the results of the study are as follows:

The first finding is that the number of people who are employed in the manufacturing sector has decreased significantly over the last few decades. This is due to a number of factors, including the fact that many manufacturing jobs have been moved to other countries, and the fact that many people have moved out of the manufacturing sector and into other sectors of the economy.

The second finding is that the number of people who are employed in the service sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many people have moved out of the manufacturing sector and into the service sector, and the fact that many new jobs have been created in the service sector.

The third finding is that the number of people who are employed in the agricultural sector has decreased significantly over the last few decades. This is due to a number of factors, including the fact that many people have moved out of the agricultural sector and into other sectors of the economy, and the fact that many new jobs have been created in other sectors of the economy.

The fourth finding is that the number of people who are employed in the construction sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many new jobs have been created in the construction sector, and the fact that many people have moved out of other sectors of the economy and into the construction sector.

The fifth finding is that the number of people who are employed in the health care sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many new jobs have been created in the health care sector, and the fact that many people have moved out of other sectors of the economy and into the health care sector.

The sixth finding is that the number of people who are employed in the education sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many new jobs have been created in the education sector, and the fact that many people have moved out of other sectors of the economy and into the education sector.

The seventh finding is that the number of people who are employed in the government sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many new jobs have been created in the government sector, and the fact that many people have moved out of other sectors of the economy and into the government sector.

The eighth finding is that the number of people who are employed in the non-profit sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many new jobs have been created in the non-profit sector, and the fact that many people have moved out of other sectors of the economy and into the non-profit sector.

The ninth finding is that the number of people who are employed in the entertainment sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many new jobs have been created in the entertainment sector, and the fact that many people have moved out of other sectors of the economy and into the entertainment sector.

The tenth finding is that the number of people who are employed in the information sector has increased significantly over the last few decades. This is due to a number of factors, including the fact that many new jobs have been created in the information sector, and the fact that many people have moved out of other sectors of the economy and into the information sector.

Rollister, Idaho. He then went to the Forwarding Company's store, found the goods there and directed the Company not to ship them. In an action in the Municipal Court plaintiff had judgment for \$105, the amount paid by him to defendant, and to reverse such judgment the defendant prosecutes this writ of error.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Whether a reasonable time had elapsed for the delivery of the goods before February 18, when plaintiff told defendant that if the goods had not been shipped he did not want them, was a question of fact for the Court, on which its finding, implied from the judgment, that such time had elapsed, should not on the evidence be disturbed. The delivery of the goods to the Forwarding Company did not vest the title in the plaintiff because the goods were not, as the Court found, shipped within a reasonable time.

Henkle v. Smith, 21 Ill. 258;

Riversay v. Kellogg, 44 id. 114;

Coyne v. Avery, 189 id. 378.

No demand was necessary to entitle the plaintiff to maintain the action, and on the evidence the Court might properly find that plaintiff had the right to rescind and did rescind before bringing the action.

We think that the plaintiff was entitled to recover, and the judgment is affirmed.

AFFIRMED.

F. A. QUINLAN,
Defendant in Error,

vs.

THE ALMINI COMPANY,
a corporation,
Plaintiff in Error.

COURT OF APPEALS
OF CHICAGO.

191 I.A. 568

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The original Almini Company had a contract for decorating the Utica Hotel and had in Syracuse a branch store of which Louis F. Hahn was manager. Hahn, for the original Almini Company, bought flowers of plaintiff quinlan to take the place of decorations which it was impossible to complete because the materials therefor did not arrive at Utica in time. The balance due for the flowers so purchased was \$58.05 and for that sum plaintiff had judgment.

From the evidence the jury might properly find that such purchase was ratified by the original Company and the debt therefor assumed by the present Almini Company, the defendant; that the contract for decorating the Utica Hotel was completed in March, 1912, and the flowers were purchased March 20 to take the place of decorations at the windows; that the present Almini Company is a mere continuance of the same business previously carried on by the same parties under the same name, and its charter states that it, "is formed for the purpose of continuing and taking over one of the same name whose charter expired January 6, 1913." Stewart was president of the new Company and owned seventy-four per cent of its stock. Wilbur was secretary and owned one per cent, and Hahn owned the remaining twenty-five per cent of its capital stock. By an agreement in writing made by Stewart, Wilbur and Hahn, February 17, 1913, it was recited that the original Almini

THE UNITED STATES OF AMERICA
DO hereby certify that
[Name] is the
[Title] of the
[Organization]

Witness my hand and seal this [Date]

Attest: [Signature]

THE SECRETARY OF THE INTERIOR

Department of the Interior

Washington, D.C.

For the purpose of [Purpose]

It is the policy of the United States

to [Policy]

and to [Policy]

to [Policy]

to [Policy]

to [Policy]

to [Policy]

to [Policy]

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to [Policy]

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to [Policy]

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to [Policy]

Company was the owner of the goods, accounts, etc., in the branch store at Syracuse; and it was agreed that Hahn should pay the debts incurred by said branch store after October 1, 1912, and the present corporation should assume the liabilities of said branch store incurred before October 1, 1912. The debt in question was incurred October 1, 1912, and was therefore agreed to be assumed by the defendant. The contention that the defendant is not liable for the price of the flowers because the charter of the original Company did not in terms authorize the purchase of flowers, is without merit. The charter authorized it to carry on all kinds of interior decoration, and it might, if necessary to complete a contract for decorating, buy flowers to be used for that purpose. Stewart, the president of the original Company, testified that Hahn made the contract for decorating the Utica Hotel; that he had authority to buy what was necessary to fulfill the contract; that the Chicago office, the principal office of the Company, received payment under the contract for the Utica Hotel.

We think that the clear preponderance of the evidence is in favor of the plaintiff, and the judgment is affirmed.

AFFIRMED.

SIMON LUKASIK,
Appellee,
vs.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

INTERNATIONAL HARVESTER COMPANY
et al.
On Appeal of INTERNATIONAL
HARVESTER COMPANY. *at*

191 I.A. 570

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings in review a judgment for the plaintiff Lukasik for \$500 against the defendant corporation in an action on the case for alleged negligence whereby plaintiff, who was in the service of the defendant, sustained a personal injury. The declaration is in a single count, which avers that the defendant was engaged in the manufacture of harvesters; that plaintiff was in its service; that defendant negligently failed to provide a sufficient number of competent servants to assist the plaintiff in rolling and placing a certain wheel, and negligently ordered the plaintiff and one other servant to take said large and heavy wheel and roll the same from its workshop and place the same up against other wheels in its yard, all of which dangerous and unsafe condition was then and there known to the defendant, or by the exercise of reasonable care could have been known to it, and was not known to the plaintiff, nor by the exercise of reasonable care could he have known it, by means whereof when the foreman of defendant ordered plaintiff to take said wheel from the shop and place the same against other wheels in its yard, and when plaintiff and one other servant of the defendant took said wheel and rolled the same out of said workshop and up to where said other wheels were stacked, and when they attempted to let said wheel down to rest against the other

wheels, owing to the great weight of said wheel they were unable to hold the same and said wheel fell, slipped and slid upon the plaintiff's feet and leg, and the narrow place aforesaid hindered and prevented the plaintiff from getting out of the way of said falling wheel, whereby plaintiff was injured.¹

✓ The wheel plaintiff and the other man were ordered to take from the shop was a fly-wheel that had been rejected, and weighed about 2000 pounds. Rejected gear wheels of about the same weight had been taken from the shop to the platform by plaintiff and another man. The difference between the two kinds of wheels was that the gear-wheels had teeth or cogs in the surface of the rim, while fly-wheels were smooth. In both kinds of wheels a hub projected from the wheel two or three inches. There was an abundance of wall space in the yards, but five or six wheels were placed one in front of another just outside the door of the shop. The first wheel was so placed as to lean against the wall and the second so as to lean against the first, and so on to the sixth. Because of the projecting hubs it was necessary to place the rim of a wheel some little distance from the wheel against which it was to lean, and necessarily the angle of inclination increased with each wheel so placed. It is not alleged in the declaration that the wheels were negligently or improperly placed, but only that owing to the great weight of the wheel which plaintiff and the other man were attempting to put in place, they were unable to hold the wheel and it fell on plaintiff's feet and injured him. Appellee contends that appellant was guilty of negligence in not furnishing one or more additional men to assist in placing the wheel. ✓ During all the time appellee had been in the service of appellant

he had from time to time taken similar fly-wheels from the shop and placed them against the wall with the assistance of one man. He knew, all the time, the character and weight of the fly-wheels which were taken from the shop to the platform and knew the strength and efficiency of Sejula, who was assisting him to place the wheel when he was hurt, for he had helped him to roll other wheels of about the same weight. He knew the difference between gear and fly wheels, for he had helped to roll both. We think the evidence shows that plaintiff had had an opportunity to become acquainted with the dangers of his employment and accepted them, and therefore cannot complain if he was subsequently injured by such dangers.

In *C. & N. I. R. R. Co. v. Geary*, 110 Ill. 383, plaintiff was a night watchman on certain railroad tracks. A train of defendant backed against him and injured him. There was no light on that end of the train and no one there to warn persons of its approach. The conductor was at the time off the cars taking the numbers of cars. In that case it was said by Mr. Justice McHofield:

"Appellee contends that appellant was guilty of negligence in not furnishing an additional helper or assistant to the foreman or conductor of the night crew, so that he could have placed a man on the rear end of the train while it was being backed and he was off taking the number of cars, to warn persons of its approach. To this appellant replies that this crew was, at the time appellee received his injury, precisely the same, in all respects, that it had been during the entire time that appellee had been in the employ of appellant. No reduction had been made in its numbers, and no addition had been made to its duties; that he knew, all the time, the character of the duties discharged by the crew, the number, efficiency and fidelity of those composing it, and voluntarily continued in his position, taking the risk of the danger incident to it, and that the negligent act of the conductor or foreman of the crew in leaving the cars while being backed, without a man on the rear end, was no more to be anticipated by appellant than it was by appellee. - it was simply the negligence of a fellow servant. This rule is, as contended by counsel for appellant, namely, when an employee, after having the opportunity to become acquainted with the risks of his

situation, accepts them, he cannot complain if he is subsequently injured by such exposure. One may, if he chooses, contract to take the risks of a known danger. Presumptively, he charges, in such cases, in proportion to the risk, or rather for the risk. *Camp Point Manfg. Co. v. Bailou*, 71 Ill. 417; *St. Louis and Southeastern Ry. Co. v. Britz*, 72 id. 357; *Chicago and Alton R. R. Co. v. Dunroe*, 85 id. 25; *Pennsylvania Co. v. Lynch*, 90 id. 383; *Wharton's Law of Negligence*, sec. 214; *C. & N. I. R. R. Co. v. Geary*, 110 Ill. 383, 382.*

The contention of appellee that appellant was negligent in failing to inspect the tier of wheels against the outer one of which appellee was directed to place the wheel in question, cannot be sustained. The declaration does not allege any failure to inspect.

Our conclusion on a careful examination of the evidence is that the evidence fails to show that appellant was guilty of any negligence which caused or contributed to the injury for which plaintiff recovered, and that the appellee assumed the risk of the injury which he sustained, and the judgment will therefore be reversed.

REVERSED.

The Court finds that the evidence in the record in this case fails to show that the appellant, the International Harvester Company, was guilty of any negligence which caused or contributed to the injury for which appellee, Elson Lukasik, recovered in this case, and that said Lukasik assumed the risk of the injury which he sustained and for which he recovered.

MAX LUSTER,
Plaintiff in Error.

vs.

ANTHONY STEINGARD,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 573

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Defendant Steingard employed plaintiff Luster, a lawyer, to defend an action for personal injury which resulted in a judgment against defendant for \$2000. Plaintiff brought this action to recover for his services in defending said action. The defense set up in the affidavit was that plaintiff's services were rendered in such a negligent manner that they were of no value to defendant. The evidence tended to prove the case stated by plaintiff. The defendant offered no evidence tending to show negligence on the part of the plaintiff. The burden was on the defendant to prove that plaintiff was negligent.

Briest v. Bodsworth, 235 Ill. 613.

The jury found a verdict for defendant, and the Court denied plaintiff's motion for a new trial and gave judgment on the verdict.

Because of the absence of any evidence tending to show negligence on the part of the plaintiff, the trial Court erred in denying plaintiff's motion for a new trial, and for that error the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

KRAUSE & MANAGAN LUMBER COMPANY,
a corporation,
Defendant in Error.

vs.

CONSOLIDATED ADJUSTMENT COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

191 I.A. 582

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

This is a suit on a contract substantially like the contracts considered by this court in Fritz et al. v. Consolidated Adjustment Co., No. 19,616, opinion filed October 13, 1914, and in Baltimore Trust Co. v. Consolidated Adjustment Co., No. 20,306, opinion filed November 30, 1914. ^{189 A. 287} ^{190 A. 35} Some of the points passed upon in those cases are made by the defendant in the present case, and what was decided in those cases, in so far as applicable to this case, is re-affirmed.

Plaintiff here is seeking to recover on the ground that defendant has failed to give the service it undertook to render for plaintiff. The questions as to performance by plaintiff and defendant of their respective obligations under the contract were submitted to a jury. The conclusion of the jury was that plaintiff had performed its obligations and that defendant had not, and this conclusion we hold was justified by the evidence. There being a complete default by the defendant so as to defeat the object of the contract, the plaintiff was entitled to recover the amount paid to defendant.

Ballance v. Vanuxem, 191 Ill. 319; Larrabee v. Ins. Co., 45 Ill. 440.

This is a case of the fourth class in the Municipal Court, and the statement of claim sufficiently complies

with the statutory requirement that it shall show the nature of the demand, and it does not seem to us important in this case whether it technically should be called a claim for damages based upon rescission or upon abandonment or for breach of contract. In this class of cases "the party suing need not even name his action, or if misnamed, that will not affect his rights, if upon hearing the evidence he appears to be entitled to recover and the court has jurisdiction of the defendant and of the subject matter of the litigation," Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. 311. Under the law plaintiff was entitled to recover the amount it had advanced.

The judgment is affirmed.

AFFIRMED.

A. C. HEISTER,
Defendant in Error,
vs.
CRANE COMPANY, a
corporation,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1911 A. 583

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

A motor truck belonging to defendant skidded into an automobile belonging to plaintiff, damaging the automobile. Plaintiff brought suit to recover compensation for damages and for loss to his business while the car was being repaired. The damages were assessed at \$350, for which judgment was entered.

We are of the opinion that this amount is so excessive under the evidence as to require a new trial. After the accident the automobile was taken for repairs to the garage of a Mr. Curtice, a man of many years experience in repairing automobiles. He testified in detail as to the damages and that he had made the necessary repairs, putting the car in good order. His bill for this was \$60, which included two small items having no relation to the accident. It is claimed that subsequently other troubles developed in the car which made it necessary to have it disassembled and re-assembled in another shop at considerable expense. It is also said that further repair to the axle became necessary, although Curtice had before that time repaired it, and testified that he had placed it in good order. Neither the character of these subsequent troubles with the car is clearly shown, nor their causal connection with the accident.

It was prejudicial error to permit the plaintiff to give his estimate as to the value per day of the car to his business. If it is sought to prove loss to plaintiff's business by the deprivation of the use of the automobile, actual monetary loss must



Map of the area around the mouth of the River.

A series of small islands and islets are situated in the mouth of the River. The islands are of various sizes and shapes, and are separated by narrow channels. The water is deep and clear, and the islands are covered with dense vegetation. The islands are situated in the mouth of the River, and are separated by narrow channels. The water is deep and clear, and the islands are covered with dense vegetation.

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be proven, and cross-examination of the plaintiff touching such alleged loss should have been allowed.

As there may be other and different testimony upon the next trial as to the cause of the accident, we make no comment at this time as to the claim of the defendant that it was free from negligence.

Because of the grossly excessive verdict and the errors indicated the judgment is reversed and the cause remanded.

Since writing the above the death of the plaintiff, A. C. Reister, on February 24, 1915, has been suggested of record. Therefore the order of reversal and remandment will be entered nunc pro tunc as of February 20, 1915.

REVERSED AND REMANDED.

143 - 20457

MRS. C. W. KENNEDY,
Defendant in Error,

vs.

GREAT LAKES DREDGE AND DOCK
COMPANY,
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT
OF CHICAGO.

191 I.A. 588

MR. JUSTICE McSHEELY DELIVERED THE OPINION OF THE COURT.

This is a suit brought by the wife of C. W. Kennedy, plaintiff in case No. 20456, in which an opinion is given this day. Judgment for plaintiff in the present case was for the loss of personal effects and was for \$225. The same evidence was introduced in both of these cases and this case was consolidated for hearing in this court with the other case. For the reasons set forth in the opinion given in No. 20456 the judgment in this case is affirmed.

AFFIRMED.



The following table shows the results of the survey conducted in 1910 and 1911. The table is divided into two columns: 1910 and 1911. The rows represent different categories of the survey. The data shows a general decrease in most categories from 1910 to 1911.

| Category | 1910 | 1911 |
|-------------------------------|-----------|-----------|
| 1. Total population | 1,200,000 | 1,150,000 |
| 2. Male population | 600,000 | 580,000 |
| 3. Female population | 600,000 | 570,000 |
| 4. Urban population | 400,000 | 380,000 |
| 5. Rural population | 800,000 | 770,000 |
| 6. Literate population | 200,000 | 180,000 |
| 7. Illiterate population | 1,000,000 | 970,000 |
| 8. Employed population | 500,000 | 480,000 |
| 9. Unemployed population | 700,000 | 670,000 |
| 10. Average income per capita | \$100 | \$90 |

The above table shows the results of the survey conducted in 1910 and 1911. The data indicates a general decline in most demographic and economic indicators over the one-year period.

219 - 20541

WILLIAM C. GIBONS,
Defendant in Error,

vs.

WILLIAMS, MONICER & COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO THE MUNICIPAL
COURT OF CHICAGO.

191 I.A. 594

MR. JUSTICE ROBINSON DELIVERED THE OPINION OF THE COURT.

This is a suit on a verbal contract to pay plaintiff for his services in negotiating a real estate transaction. Plaintiff had judgment for \$250. Defendant admits the services and the promise to pay, but denies that it agreed to pay as much as plaintiff claims. There was evidence tending to corroborate plaintiff's testimony as to the amount agreed upon to be paid, and the jury might reasonably conclude that plaintiff was entitled to recover \$250. The verdict will not be disturbed.

To the contention that plaintiff is not a licensed real estate broker, it is sufficient to say (1) that this is not a suit for broker's commission but upon a promise of the defendant, a corporation in the real estate business, to pay plaintiff for services rendered, and (2) there is no ordinance before us which requires a real estate broker to have a license.

The judgment is affirmed.

AFFIRMED.



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HERBERT L. JOSEPH & CO.,
a corporation,

Defendant in Error,

vs.

SIDNEY E. LEVY,

Plaintiff in Error.

ERROR TO THE JUDICIAL
COURT OF CHICAGO.

191 I.A. 595

MR. JUSTICE McGRATH DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant as guarantor on a written contract for certain payments to be made to plaintiff, and had judgment for \$50.50. The contract in part is as follows:

"In consideration of the settlement of the account of Mamie Ward, I promise to pay to Herbert L. Joseph & Co., Store No. _____, Price \$65.00 I hereby agree to pay Herbert L. Joseph & Co., at Chicago, Ill., or their authorized agent, the sum of \$65.00 as follows: \$5.00 on 6/9/13 down and the balance in wly installments of \$5.00 each, payable on Monday of each and every wk until paid in full."

Next follow provisions concerning the sale and purchase of and the title and right of possession to "said property." The contract is executed thus:

"Witness my hand and seal this 4th day of June, 1913.
(Customer) Mrs. May Baker (Seal)
Address 428 S. Morgan.....Flat
(Guarantor) Sidney E. Levy (Seal)
Address 105 W. Monroe St."

There is no merit in defendant's claim of no consideration. The settlement of the account of Mamie Ward with plaintiff was sufficient consideration for the undertaking of Mrs. May Baker and of the defendant. Underwood v. Bossack, 38 Ill. 209; Hillman v. Madelkoffer, 160 Ill. 121.

The signing by defendant of his name in the place it appears on the contract was sufficient to make him a guarantor without the addition of other words.

There was no error in the rulings of the court on the admissibility of evidence. No objection was made to any

inquiry concerning the obligations of said card to plaintiff and the settlement of her account, and questions as to other considerations were incompetent.

The point that the finding is for a dollar more than the amount claimed in the statement of claim is met by referring to the record, where it appears that the court gave leave to plaintiff to amend the statement by increasing the amount claimed; that an actual literal amendment was not filed is not important in a case of the fourth class. (See Siegel, Cooper & Co. v. Metropolitan Amusement Assn., 141 Ill. App. 89.)

The judgment is affirmed.

AFFIRMED.

H. LASKEY,
Defendant in Error,

vs.

SAMUEL MENDELSON and BEN-
JAMIN MENDELSON, doing
business as Mendelson Bros.,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

1911 A. 597

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

In this case plaintiff had judgment which must be reversed and the cause remanded for a new trial because of errors in the rulings of the trial court on the admissibility of evidence.

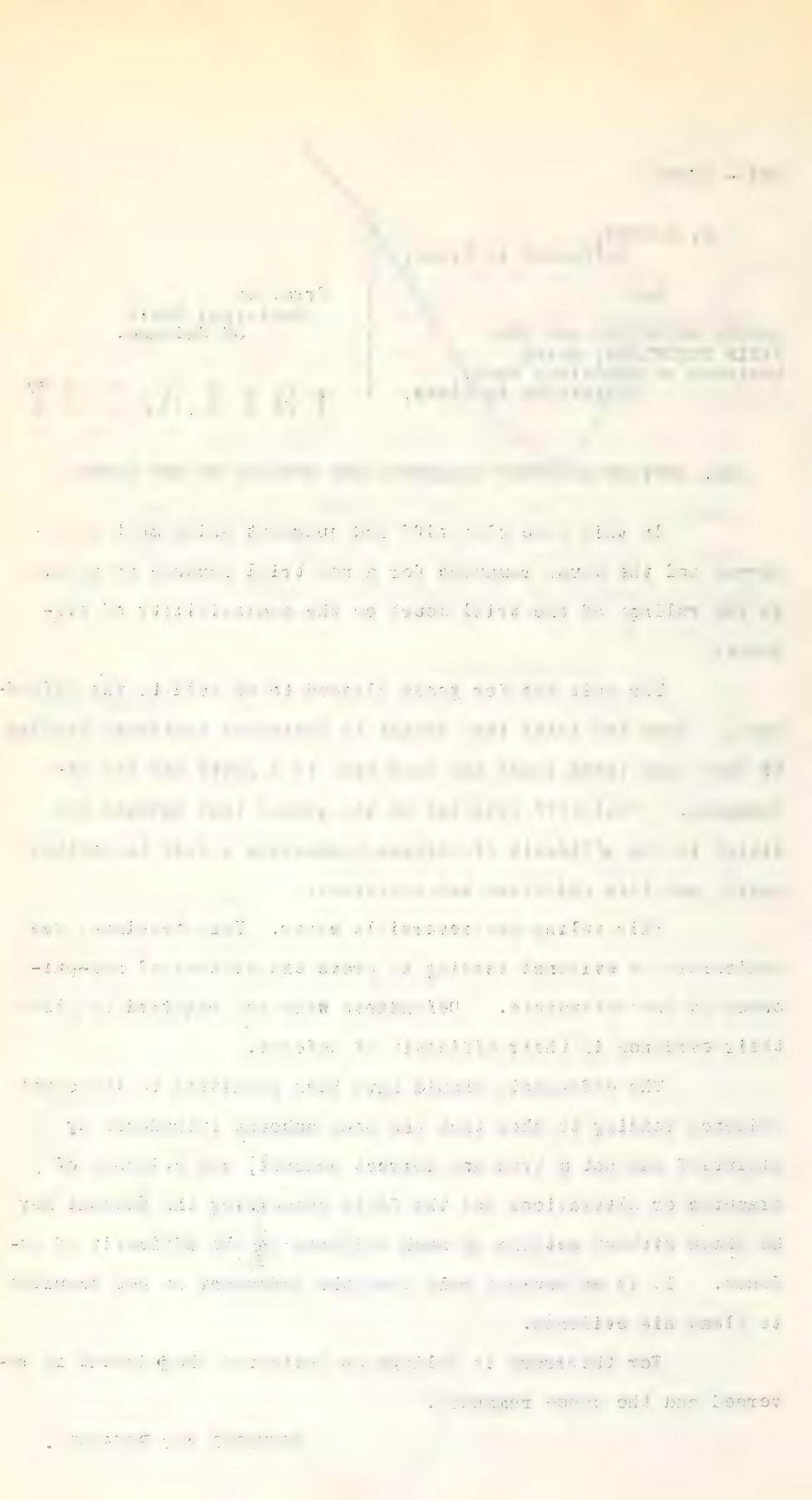
The suit was for goods claimed to be sold to the defendants. Upon the trial they sought to introduce testimony tending to show that these goods had been sold to a party not the defendants. Plaintiff objected on the ground that nothing was stated in the affidavit of defense concerning a sale to another party, and this objection was sustained.

This ruling was reversible error. This testimony was admissible as evidence tending to prove the defense of non-purchase by the defendants. Defendants were not required to plead their evidence in their affidavit of defense.

The defendants should have been permitted to introduce evidence tending to show that the book account introduced by plaintiff was not a true and correct account, and evidence of erasures or alterations and the facts concerning the account may be shown without setting up such evidence in the affidavit of defense. It is an ancient rule that the defendant is not required to plead his evidence.

For the errors in rulings as indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.



T. ANTHONY KRAUSER,
Defendant in Error.

vs.

THE THOMAS B. JEFFERY COMPANY,
a corporation,
Plaintiff in Error.

BRANCH TO THE MUNICIPAL
COURT OF CHICAGO.

1911A.598

MR. JUSTICE McCORMICK DELIVERED THE DECISION OF THE COURT.

Plaintiff brought suit on an agreement said to have been made by defendant to sell plaintiff's automobile, and had judgment for \$700, which defendant seeks to have reversed.

The chief contention concerns the fact as to the alleged agreement to sell. Plaintiff's story is that in the spring of 1911 he purchased a car of the defendant company, which is in the business of manufacturing and selling automobiles. Plaintiff agreed to pay for the car \$1,500, and paid \$1,000 in cash and gave his notes due in one year for the balance. The car was of the make of a prior year and defendant agreed to "overhaul" thoroughly the chassis, and guarantee it the same as it guaranteed its 1911 cars. Plaintiff's testimony tends to show that when he used the car it proved to be defective and that it had not been repaired or altered in the manner as defendant had agreed. Plaintiff made many complaints to the defendant through its manager, Mr. Jay. The car was taken to defendant's shops many times, and finally, in May, 1911, was left at the garage of the defendant. Plaintiff testified that in November, 1911, Mr. Jay, acting for the company, agreed to sell the car for plaintiff for not less than \$1,500, and out of the proceeds to cancel the notes for \$1,000 and pay plaintiff the balance of \$700, or any balance that the car might bring in excess of \$1,500. That such an agreement

was not performed is conceded, but defendant's position is that no such agreement was made. Plaintiff's testimony that such was the agreement is weakened by his subsequent letters to the defendant, notably his letter of August 24, 1912, in which he undertakes to tell "the entire story," but says nothing about any agreement made in November, 1911, and refers to a proposition made by the defendant in June of 1912. However, as tending to favor his story, we find in the testimony of Mr. Jay no definite denial of plaintiff's version of what Jay said in the conversation of November, 1911, and the jury reasonably might conclude from Jay's testimony either that he had forgotten what he said or that he could not truthfully contradict plaintiff's statement of the conversation. We have, therefore, substantially the uncontradicted story of plaintiff as to the agreement, except as plaintiff's own subsequent conduct and letters tended to disprove it. These latter matters could hardly be said to be conclusive against plaintiff's position, although tending in that direction. There were a number of minor circumstances giving a basis for a more or less plausible argument to the jury in support of plaintiff's contention. The result of the trial hinged upon the credibility of the witnesses in the light of all the facts and circumstances in evidence, and a majority of this court is of the opinion that it is not clear that the conclusion of the jury was wrong.

A sufficient consideration for the agreement was the release of the defendant from its guaranty concerning the condition of the car, or the payment of plaintiff's notes before maturity. Either or both considerations would support defendant's undertaking.

It is argued forcefully that it was prejudicial error to permit Murr, a former employee of defendant, to tes-

tify that the car had not been overhauled, as defendant had first contracted. We think it was competent as tending to prove consideration, as above suggested, but if this were not so plaintiff, without objection, had already testified fully as to the condition of the car after he received it, and Murr's testimony was admissible as corroborative.

For the reasons indicated the judgment is affirmed.

APPEAL.

MR. PRESIDING JUSTICE BROWN DISSENTS.

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FRANK BENKO,
Defendant in Error,

vs.

KATE LENARD,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

1911 A. 600

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In this case defendant in error, plaintiff below, renews a motion to strike from the record the bill of exceptions. We have heretofore denied a similar motion, and we see no reason upon the present motion to change our opinion. The present motion to strike is denied.

✓ This is a suit to recover \$200 paid by plaintiff to defendant as earnest money upon a contract for the purchase and sale of real estate. Upon the trial the court gave judgment for the plaintiff. The contract is in part as follows:

"THIS MEMORANDUM WITNESSETH, That Kate Lenard hereby agrees to sell, and Frank Benko agrees to purchase at the price of Eighteen Thousand Dollars, the following described real estate, situated in Cook County, Illinois.

(Here is given description of the property.)

"Said purchaser, Frank Benko, has paid Two Hundred (\$200.00) Dollars as earnest money, to be applied on said purchase when consummated, and agrees to pay the sum of Seventeen Thousand Eight Hundred (\$17,800.00) Dollars, sixty days after the date hereof, provided that the said Kate Lenard at that time delivers to him a good and sufficient Warranty Deed with release of dower, conveying to said purchaser a good title to said premises, and upon the further condition that the abstract of title to said premises shows a good title.

"A complete Abstract of Title or merchantable copy to be furnished within a reasonable time, with a continuation thereof brought down to this date. In case the title upon examination is found materially defective within ten days after said Abstract is furnished, then unless the material defects be cured within a reasonable time after written notice thereof, the said earnest money should be refunded to the said Frank Benko, and in addition to said earnest money the said Kate Lenard shall pay to him, the amount of his expenditures and loss that he has sustained by reason of this contract.

"Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, including commissions payable by vendor, and this contract shall be and

become null and void. Time is of the essence of this contract, and of all the conditions thereof.

"IN TESTIMONY WHEREOF, said parties hereto set their hands this 8th day of June, A. D. 1912.

KATE LENARD,
FRANK BENKO."

The sale was not consummated, and the dispute is as to which party was in default.✓

The contract was drawn up by Frank Foster, an attorney at law, and was signed by the parties in his office. It is a controverted point as to whether Foster was acting in this transaction as attorney for the plaintiff or for the defendant, but after consideration we are of the opinion that the trial court could reasonably conclude from the evidence that Foster was acting as the attorney and representative of the defendant.

After the execution of the contract and the payment of earnest money, the next move under the contract should have been made by the defendant; that is, she should have furnished to plaintiff an abstract of title. The testimony shows that she brought the abstract to Foster and left it with him and that he had it continued, and it remained in his office until after the expiration of the (sixty day period) within which the deal was to be closed. Foster being defendant's attorney, a delivery of the abstract to him was not a delivery to the plaintiff; hence there was no compliance by defendant with the terms of the contract with reference to the abstract. The defendant thus being in default, the plaintiff had the right to rescind the contract and recover the earnest money.

It availed defendant nothing to tender a warranty deed after the expiration of the sixty day period and while she was in default as to the abstract. The evidence shows that plaintiff demanded the return of the earnest money and indicated his intention to rescind the contract. Hence citations of cases involving different facts are not in point.

Seeing no reason to disagree with the finding of the trial court, the judgment is affirmed.

AFFIRMED.

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ELMER S. EPSTEIN,
Defendant in Error,

vs.

H. & E. HOTEL CO.,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1911 A. 603

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered judgment for clothes and a handbag stolen from his room in the Lexington Hotel, which hotel belonged to defendant. The defendant says that while an inn keeper may be responsible for the safe-keeping of the goods of his guest, a lodging house keeper is not, and it urges in argument that the evidence shows plaintiff to have been a permanent lodger and not a transient guest. This issue was submitted to the jury by a special interrogatory, namely, "Was the plaintiff a permanent lodger in the hotel of the defendant on the 16th day of May, 1913?" and to this the jury answered "No." It is unnecessary to narrate the testimony submitted to the jury, but after giving it consideration we are of the opinion that this answer cannot be said to be an unreasonable conclusion from the evidence.

This case in its chief aspect is similar to the case of Cross v. Saratoga European Hotel & B. Co., 176 Ill. App. 160, where this court said (p. 162): "This court is on record in Moon v. Yarian, 147 Ill. App. 383, as holding to the doctrine which we believe is the better and accepted one, that a weekly rate and a lengthy stay do not, in the absence of taking up a permanent abode at a hotel, take away from a person the status of a 'hotel guest.'"

Complaints made on the rulings of the court on

the admissibility of evidence are without merit. It was not error to exclude as evidence the amended statement of claim, which was not signed by plaintiff and was subsequently withdrawn.

Substantial justice has been done, and the judgment is affirmed.

AFFIRMED.

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AETNA LIFE INSURANCE CO.,
Defendant in Error,

vs.

WADEFORD ELECTRIC COMPANY,
a corporation,
Plaintiff in Error

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1911 A. 606

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover premiums due under certain policies of liability insurance issued at the special instance and request of the defendant. Defendant filed an affidavit of defense which, apparently, on motion of plaintiff, the court struck from the files. Thereupon defendant filed an amended affidavit of defense, which, upon plaintiff's motion, was struck from the files, and judgment for \$82.22 was entered against defendant on plaintiff's affidavit of claim. No motion was made by defendant asking leave to file an amended affidavit of defense. The record does not show any objection to the entry of the order striking the affidavit of defense from the files, nor to the entry of the judgment, nor to the order overruling defendant's motion to set aside the default and judgment. No propositions of law were submitted to the court.

No motions or orders are preserved by a bill of exceptions; therefore, under the authority of Mann v. Brown, 263 Ill. 394, they are not before us for review.

Defendant makes an argument based upon certain provisions said to be contained in the insurance policies referred to in the statement of claim, but as no policies are to be found anywhere in the record we can have no opinion as to their provisions.

There being no error in the common law record the judgment is affirmed.

AFFIRMED.

THE LORD & BUSHNELL COMPANY,
a corporation,
Defendant in Error,
vs.

W. J. CAMPBELL, trading as
W. J. CAMPBELL LUMBER COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1911 A. 607

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant claiming an unpaid balance due for the purchase of certain lumber sold to defendant. The defendant admitted the sale and delivery at the price alleged, but claimed he had a contract with the plaintiff for further lumber at the same price, and that in violation of this contract plaintiff refused to deliver the balance of the lumber, to the damage of defendant.

Whatever agreement there was between the parties was created through correspondence between them. There are approximately thirty letters in the record, and it would only serve unduly to lengthen this opinion to give quotations therefrom. After having read and considered these letters we are of the opinion that the trial court was right in the conclusion that there was no contract for the delivery of further lumber to the amount of 300,000 feet, as claimed by the defendant. Hence defendant was not entitled to any damages as a set-off.

However, we hold that the court was in error in not including in the finding and judgment an item of \$70.00 shown under date of March 10, 1913, in the statement of claim. Plaintiff had bought from defendant some "hardwood" and "grain door lumber" which plaintiff had rejected. After one or two conferences the dispute over this was adjusted, and a writing to this effect was signed by defendant and delivered to plain-

tiff. This writing is as follows:

"Chicago, Jan. 16, 1913.

Lord & Bushnell Co.,
Gentlemen:-

Per arrangement with Mr. Henry in your office this morning you may charge our account \$70.00 allowance on the contents of C. & N. W. car 96480 C. G. W. car 23528. This allowance of \$70.00 to be full and final settlement of your claim against these two cars of lumber.
(Signed) W. J. Campbell Lumber Co."

Subsequently the representative of the defendant got possession of the paper for the ostensible purpose of examining it but he "tore it up and put the pieces in his pocket." From the testimony it is apparent that this action was inspired by anger because he was not able to arrive at any understanding with plaintiff as to the claimed contract to sell more lumber, but however this may be the parties had already agreed upon a settlement of the item referred to in the writing, without reference to any other matter. The destruction of the original paper did not destroy the agreement but only the best evidence of it. Plaintiff, having proved the terms of the agreement by introducing a copy, was entitled to the allowance of \$70.

For the error in failing to include this item the judgment is reversed, and judgment for plaintiff is entered in this court for \$429.19 and costs.

REVERSED AND JUDGMENT IN THIS COURT.

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220 - 20147.

AUGUSTUS B. JUILLIARD, et al.,
Defendants in Error,
vs.
JACOB FRIEDMAN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1911 A. 609

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

The plaintiffs, who are dry goods commission merchants in New York, sued the defendant, a manufacturer of neckwear in Chicago, for the contract price of eleven pieces of bengaline silk alleged to have been sold and delivered to the defendant. There have been two trials. The judgment in the first was reversed on account of an error in the admission of evidence (Juilliard v. Friedman, 174 Ill. App. 289.) The present writ is brought to reverse a judgment for the plaintiffs in the second trial.

The only issue of fact presented to the jury was whether the defendant ever ordered the goods in question from the plaintiffs. The plaintiffs claimed that two orders were given for the same number of pieces of silk, one on January 4, 1910, and the other on January 8, 1910. The defendant admitted giving the second of these orders, but denied giving the first. The goods covered by the second order were delivered, accepted and paid for. As to the first order, the plaintiffs' salesman testified that on January 4, 1910, he visited the defendant at his place of business in Chicago, and exhibited certain samples of silk to the defendant and his cutter: that defendant selected and ordered eleven pieces out of the fourteen submitted; that the salesman made a memorandum of such order, left a copy of the same with the defendant, and sent the order to the plaintiffs in New York. A day or two later, plaintiffs sent the goods by freight and mailed an invoice to the defendant. Defendant admitted that he received the invoice nearly a week

before the goods arrived, but paid no attention to it. When the goods arrived, however, he examined them and at once repacked and shipped them back with a letter stating: "We have this day returned the eleven pieces of goods sent January 4th as we find we cannot make the same into neckwear." The defendant's theory was that these goods were sent on approval, without any order, as, he claims, is sometimes done.

In the former opinion filed in this case, we said: "No question is raised as to the amount plaintiff may be entitled to recover, if anything, where the goods are returned by the defendant and retained by the plaintiff." The same observation is true in this case. In Ames v. Blair, 130 Ill. 522, it was said (p. 531): "What are the rights of a vendor of goods where the vendee refuses to pay upon delivery or an offer to deliver goods? This question arose in Bayley v. Windlay, 42 Ill. 528, and this court held that the vendor had three remedies: First, the vendor may store the goods for the vendee, give notice that he has done so, and then recover the full contract price; second, he may keep the goods, and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery; and third, the vendor may sell the goods to the best advantage, and recover of the vendee the loss, if the goods fail to bring the contract price. The same rule is laid down in Benjamin on Sales, (2d ed.) sec. 782."

It appears from the record that upon the trial, counsel stipulated that the plaintiffs "refused to accept the return" of the goods. It appears, however, from the testimony of the plaintiffs' salesman that the goods remained in the possession of the plaintiff in New York for some time, at least, after they were returned, for he testified that he saw them there. There was no stipulation and no evidence to the effect that they were held or stored by the plaintiffs as the defendant's property or subject to

his order, or that notice to that effect was given by the plaintiffs to the defendant. Apparently the goods were permanently retained by the plaintiffs, or were subsequently re-sold. If such was the fact, then, under the rule above quoted, the measure of damages is not the full contract price, but only the excess if any, of the contract price over the market price of the goods at the time and place of the delivery to the defendant.

Upon the sole question submitted to the jury, viz: Whether the defendant ever purchased the goods in question, there is an irreconcilable conflict in the evidence. The only witness for the plaintiffs was their salesman. The record shows that plaintiffs' counsel produced the same books which we held were improperly admitted in evidence upon the first trial, asked the witness to identify them, and the witness was then permitted, over the objection of defendant's counsel, to state that he made an entry of the order in such books. The witness was also permitted, over objection, to testify to a private custom of the plaintiffs, unknown to the defendant, regarding their method of sending out bills for goods sold. Both these rulings were erroneous. The record further shows that these two alleged facts, neither of which was competent for any purpose, were dwelt upon in the argument of plaintiffs' counsel as tending to corroborate the evidence of the plaintiffs' salesman, and the jury may well have taken that view. As the evidence of the plaintiff's salesman was wholly without corroboration except by these alleged facts and circumstances, and in view of the apparent fact that the plaintiffs retained the goods, for their own benefit after they were returned, we are unable to say that it appears that substantial justice was done by the verdict of the jury, notwithstanding the errors above mentioned. Therefore, the judgment will be reversed and the cause awarded for a new trial.

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355 - 20164.

GEORGE de TARNOWSKY,
Defendant in Error,

vs.

CHARLES H. WALKER,
Plaintiff in Error.

} ERROR TO

} MUNICIPAL COURT

} OF CHICAGO.

MR. PRESIDING JUSTICE NITCH delivered the opinion of the court.

This writ of error is brought to reverse a judgment of the Municipal Court of Chicago, upon a directed verdict for the plaintiff. The suit was brought to recover the value of services rendered by the plaintiff, who is a physician and surgeon, to the minor son of the defendant, at the request of the father. The boy's right leg had been run over by a freight car, and was badly crushed from the ankle nearly to the knee. When the accident occurred, on December 23, 1912, the boy was carried into a house nearby, and the plaintiff, who lived in the vicinity, was called, apparently by some witness to the accident. When the plaintiff arrived, he saw that the leg was badly crushed and that the blood was spurting from one of the large arteries. He applied a tourniquet to arrest the hemorrhage, pulled off the stocking, and put the limb in temporary splints. The boy was then taken in the police ambulance to a hospital. There he was taken at once to the operating room, where the plaintiff removed from the wound sundry pieces of leaves, coal and cinders, sutured the torn muscles, put in drains and dressed the limb in antiseptic dressings. The boy was then put to bed. The plaintiff testified that he did not consider it advisable to amputate the leg at that time, for two reasons: first, the state of severe shock in which the boy was found, and second, "there was a chance - a one to one-hundred chance - that the boy's limb might be saved," which chance the defendant told him to take. The next day the boy's temperature was high and his pulse rapid.

The night following, he was delirious most of the time. The plaintiff testified that the boy was carefully attended at the hospital, furnished with a special nurse, the dressings changed and soaked with hot antiseptics every few hours, and his condition carefully watched; also that saline injections were given. The third day (December 25th) the lower part of the limb was gangrenous. In the afternoon of that day, the defendant requested permission to have Dr. McClintock, the family physician, see the boy. The plaintiff consented. The plaintiff testified that they together took off the bandages and examined the wound; that "both agreed that the circulation was practically shut off;" that Dr. McClintock gave it as his opinion that the boy was suffering from blood poisoning; that at that time, the boy's pulse was bad; "that it looked as though he might pass away that day, and in order to tide him over I gave him a pint and a half of normal saline in the vein, * * * and that actually, I think, did tide the boy over that crisis." He also testified that the next day (December 26th) the condition of the boy's pulse and temperature was better, but that the leg "was practically all black" from a point three inches below the knee downward; that he then called Dr. McClintock's attention to the fact that amputation was "merely a question of hours," but that Dr. McClintock suggested that they would better wait "until there was a good line of demarcation." Soon after this alleged conversation, the boy was taken away from the hospital by the defendant, and the plaintiff's connection with the case ceased.

The defendant called Dr. McClintock as a witness. He testified that he first saw the boy at the hospital in the presence of the boy's father and mother, on the morning of the day after the accident. He said he had a talk with the plaintiff at that time, but was not permitted to state any of the conversation. He testified that he saw the boy again the evening of the same day, and

noticed his condition. When asked what his examination disclosed as to the boy's condition, the question was objected to and the objection sustained. He testified that he again visited the hospital about six o'clock in the afternoon of the third day; that he went there at the father's request, and that he had a consultation with the plaintiff. When asked what was said by the plaintiff, an objection was made and the objection sustained. He testified that at that time, (December 25th) the boy's pulse was 138 and his temperature 105 1/2, that he was delirious, that there was a marked odor of gangrene, and that "the whole appearance of the boy was so as to give evidence of a rapidly approaching fatal condition." On motion of the plaintiff's attorney, this statement was stricken out, over the defendant's objection. The same witness testified that he talked with the plaintiff at that time about the boy's condition and as to the proper surgical and medical treatment to be applied, but when asked what was said, the witness was not permitted to answer.

At this point in the examination of the witness, defendant's counsel said: "I do not wish to keep asking questions, but may I ask if the court rules that any conversation between Dr. de Tarnowsky and Dr. McClintock at that time is not competent relating to the boy?" The court replied: "Yes, and for the very obvious reason that it appears thus far by both the plaintiff and the defendant, that the plaintiff agreed to a consultation, - the defendant asked for a consultation and the plaintiff agreed to it - and they had a consultation, and therefore what they talked about at that consultation is immaterial." The witness then testified that after the consultation, the plaintiff gave the intravenous injection of saline solution. The following then occurred in the presence of the jury:

"Mr. Bishop. Who, if anyone at that time suggested to you -

A. I did.

"Q. - the application or use of this saline solution?"

"Mr. Holton: I object.

"The Court (to the witness): Leave the witness stand. You know that question was to be objected to and you deliberately answered it, as you have several times before, - aching here all this time to get in that answer to that question."

Thereupon, the witness left the witness stand, and the court said to defendant's counsel: "Proceed with some other witness and get a witness who is willing to be fair." Counsel replied that he had no other witness, but would make an offer of proof out of the hearing of the jury. An argument ensued between the court and counsel in the presence of the jury, in the course of which the court used the following language: "This witness, after deliberately warning him two or three times, - he deliberately tried to inject his answer in before counsel got in his objection - he did it designedly, with a purpose, and when this is done - done repeatedly - the witness is no longer entitled to sit on a witness stand and be heard. * * * This witness seems overly anxious. It is not proper that one member of the profession should be overly anxious to punish another member of a profession even though parties may differ. But when a witness of that kind takes deliberate opportunity to deliberately defeat some other member of the profession, it seems to me going entirely outside the bounds. * * * He is one of those very smart young doctors that want to show he knows it all and no other physician knows what he is acting on. He thought that he would show us, in spite of court and in spite of counsel and everybody and anybody else, he was going to show how smart he was. He will find out that courts of justice are not constituted for such purposes as that."

After taking exception to these remarks, defendant's counsel made an offer, out of the presence of the jury, to prove by Dr. McLintock that at the time the consultation was requested, the plaintiff said that he had exhausted his medical knowledge and skill in his effort to save the boy and that he regarded his con-

dition as hopeless, and that he repeated this statement at the time of the consultation; that during the consultation Dr. McClintock asked if any attempt had been made to inject saline solution into the veins, and plaintiff replied in the negative; that Dr. McClintock then suggested that this be done at once, which was done, and that the boy's condition improved at once, his pulse went down and the fever subsided, and the next day the boy was much better and he was then removed from that hospital to another, where Dr. McClintock amputated the limb "about half way between the knee and the thigh;" that had the salt solution been administered earlier, in a proper manner, the boy's condition would have been such that the amputation could and should have been performed on the second day, in which case, all of the boy's leg above a point about three inches below the knee could have been saved; that when the witness examined the leg after the boy had been removed from one hospital to the other, he found grass, leaves and dirt in the wound, which, according to good practice among physicians, should have been removed not later than December 24th, and that the presence of this foreign matter in the wound was largely responsible for the condition of infection found at the time of the consultation, which condition was directly caused by the failure of the plaintiff to give the boy proper medical and surgical attention. An objection to this offer was sustained and the court thereupon instructed the jury to find a verdict for the plaintiff for the amount claimed.

We find nothing in the record that justifies either the rulings of the trial court, or the quoted remarks of the court. Whatever was said and done by the plaintiff regarding the boy's condition and the plaintiff's treatment of the case was competent. The plaintiff having testified that he injected the saline solution into the veins prior to the consultation, and (inferentially, at least) that this was done upon his own initiative, it was competent for the defendant to show, if he could, that such was not the fact,

that
but, on the contrary, the defendant had admitted that he had reached the limit of his own knowledge and skill without having made use of such an injection, and that the injection was the result of his consultation with Dr. McClintock. Such evidence would have a tendency to prove that the plaintiff did not use reasonable care and skill in his treatment. It was error for the court to exclude it.

The record filed in this court contains a document, signed by the trial judge, which he certifies is "a correct stenographic report of the proceedings at the trial of said case," and it does not appear from this document that the court warned the witness McClintock, at any time, or upon any subject, prior to the peremptory order to "leave the witness stand." However, even if the court had in fact warned the witness not to be so quick with his answers, that fact would not authorize the court to exclude any competent evidence of the witness, nor to deprive the defendant of the benefit of such evidence. The court had full power to punish the witness for any wilful disregard of its warning, if any was given, but the proper exercise of that power did not require the court to compel the witness to leave the stand, nor to discredit him and his testimony in the presence of the jury. The remarks of the court were clearly prejudicial to the defendant, and the error could not be cured by committing the further error of refusing to hear the offered proof and instructing the jury to find a verdict for the plaintiff.

It is urged, however, by the plaintiff's counsel that even if everything contained in the offer of proof had been shown by competent evidence, the court would have been compelled to instruct the jury to find for the plaintiff. We cannot agree with this contention. We think the offered testimony, if proved, would at least have raised a fair issue of fact as to whether the plaintiff's services were of any value. That such a defense may be made in a

case of this character was affirmed in Sharkey v. Miller, 68 Ill. 553.. We think it is apparent from the record before us, however, that the trial court did not exclude the offered testimony upon the ground that it was or would have been incompetent or insufficient to defeat the claim of the plaintiff, but that the offer was refused solely upon the ground that he would not permit the witness, whom he had ordered off the witness stand, to testify at all, even though it appeared that there was no other witness by whom the facts might be shown.

We are constrained to hold that the defendant did not have a reasonable opportunity to present his defense, and for that reason, the judgment of the Municipal court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

RICHARD F. McDONALD, Jr.,
Defendant in Error,

ERROR TO

vs.

MUNICIPAL COURT

LEHIGH VALLEY RAILROAD COMPANY,
a Corporation,

OF CHICAGO.

Plaintiff in Error.

191 I.A. 628

MR. PRESIDING JUSTICE FITCH delivered the opinion of the court.

This writ of error was used out to reverse a judgment rendered by the municipal court in favor of Eugene F. McDonald, Jr., the plaintiff in that court, against the Lehigh Valley Railroad Company, defendant, for \$500 damages alleged to have been sustained by the failure of defendant to safely carry the plaintiff's automobile from Truxton, New York, to Chicago, Illinois. The case was tried before the court without a jury. The evidence on the part of the plaintiff consisted of a freight bill of the Michigan Central Railroad Company, issued at Chicago, a bill of lading alleged to have been issued by the defendant, and the testimony of the plaintiff and two other witnesses as to the condition of the automobile and its value at the time it arrived in Chicago. The defendant introduced no evidence. Upon the trial, defendant's counsel stated that defendant did not deny having received the automobile, but claimed there was no negligence on its part. We find no competent evidence in the record as to the condition of the automobile or its value at the time it was delivered to the defendant for transportation. The alleged bill of lading states that the defendant received an automobile from one W. Stone, at Truxton, New York, on May 29, 1912, "in apparent good order." This alleged bill of lading, however, was admitted in evidence over the objection of the defendant, without any competent proof of its execution by the defendant. It is a printed form of a bill of lading, and purports to be signed by an agent of the defendant, but there is no

proof whatever that the signature is that of the alleged agent, nor that he was, in fact, an agent of the defendant. The plaintiff testified that this alleged bill of lading was sent to him by his attorneys in New York; but where they got it, does not appear. The admission of counsel that defendant received the plaintiff's automobile for transportation was not an admission that it was then in good order and condition. The record shows that it had then been in use for some time, and, for aught that appears, (apart from the alleged bill of lading) it may have been in the same condition, when shipped, as it was when it arrived in Chicago.

A rule of the municipal court is relied on to supply this defect in the proof, but such rule is not in the record, and we cannot take judicial notice of it. (Libby v. Chicago City Ry. Co., 240 Ill. 475.)

We are of the opinion that the court erred in admitting the bill of lading in evidence, and there being no other evidence to sustain the claim of the plaintiff, the judgment must be reversed and the cause remanded.

REVEREND AND BELIEVED.

1911 A 629
323 - 20258.

ROSEN'S CATHOLIC ORDER OF
FORESTERS,

Appelles,

vs.

MARY HILL, et al.
MARY HILL,

Appellant.

APPEAL FROM

SUPERIOR COURT

CORR. COUNTY.

1911 A. 629

Mr. Presiding Justice WITCH delivered the opinion of the court.

A bill of interpleader was filed in the Superior court by the Rosen's Catholic Order of Foresters, a fraternal insurance association, to determine the ownership of a fund of \$1,000 admitted by it to be due to one or the other of two daughters of Mrs. Agnes C. Van Wazer, deceased. From a decree awarding the fund to Mrs. Jennie Oetzman, one of such daughters, the other, Mrs. Mary Hill, appeals.

In 1898, Mrs. Van Wazer became a member of one of the subordinate lodges, or "courts," of the association, and an "endowment certificate" for \$1,000 was issued to her, payable upon her death to her husband. The husband died some time prior to April, 1910, and in that month, upon her written request and the surrender of her certificate, a new certificate was issued, payable to her daughter, Mary Van Wazer, now Mrs. Hill. Mrs. Van Wazer had several other children, and about the time this change was made, she and her daughter, Mary, sent to the house of the financial secretary of the court to which Mrs. Van Wazer belonged, and talked over the matter of changing the certificate. Mrs. Van Wazer told the secretary that her daughter Mary "had always done what was right," while the others had not; that "Mary was the only one of the family that was deserving of the insurance," and was the only one that she (Mrs. Van Wazer) "could trust;" that she (Mrs. Van Wazer) "wanted \$100 for masses out of the money," and "a headstone laid at her grave," and that she wanted Mary to attend to these things after her death.

2577-176

Mary agreed to do so. Mrs. Van Wazer then said: "Now Mary, if I cannot pay the dues, you will have to pay them, for the money is going to be yours;" and to this Mary also assented. After this arrangement was made, Mary paid, out of her own money, most of the dues as they accrued during her mother's lifetime. In September, 1911, the certificate was placed by Mrs. Van Wazer in a safety deposit box, (which was rented for that purpose by Mrs. Hill at her mother's request) and it remained there until the death of Mrs. Van Wazer, which occurred on February 12, 1913.

For several years prior to her death, Mrs. Van Wazer suffered from chronic asthma, and about a week before her death, she was taken sick with bronchial pneumonia. During this last illness, her son, Peter van Wazer, and her daughter Jennie, now Mrs. Detzman, were living at the home of the insured. Three days before Mrs. Van Wazer died, the recording secretary of the court to which she belonged, called on her. Mrs. Van Wazer told the secretary that she would like to change her policy "to Jennie without Mary knowing it," and asked how this could be done. The by-laws of the society provide that any member in good standing may surrender her certificate at any time and have a new one issued, payable to such beneficiaries as she may direct by endorsing such surrender and request on the back of the certificate. The by-laws also provide that if the certificate be lost, a new certificate "payable to the same or a new beneficiary" will be issued "upon making an affidavit of the facts in the case satisfactory to the High secretary." The recording secretary suggested that the latter course be followed, and told Mrs. Detzman, who was present, to "go down to the high court and get an affidavit," meaning a blank form of affidavit to the effect that the certificate was lost. Both the insured and Mrs. Detzman knew that the certificate was not lost, but was in the possession of Mrs. Hill, and was payable to her. Nevertheless, Mrs. Detzman went to the main office of the association in the Unity

Building, Chicago, and there obtained from the high secretary a printed blank form of affidavit as to the loss of the certificate. With this, she called at the office of a notary public, and, taking him with her, returned to the house of the insured. There, about eleven o'clock in the forenoon of February 10, 1912, the notary filled in the blanks in the affidavit, which states that the insurance certificate "is now lost;" that the insured had "made diligent search to find it but cannot;" that she "now desires" a new certificate to be issued, payable to her daughter, Jennie Van Wazer. Mrs. Getzman and Peter Van Wazer testified that this affidavit was then signed by the insured and by them as witnesses. The notary did not testify.

This affidavit was offered in evidence, and the original is a part of the record filed in this court. It is dated February 10, 1912, but purports to have been sworn to on February 11, 1912. The signature of Mrs. Van Wazer consists of a series of scrawling, irregular marks, bearing not the slightest resemblance to her signature as she wrote it in April, 1910 (which is also in the record).

Mrs. Getzman and Peter van Wazer testified that their mother - who was then between 60 and 70 years of age, and was very sick - was sitting in a chair at the time this affidavit was signed; that the notary read the whole affidavit to her and asked her if she knew what she was doing, and if she was doing it willingly, to which she replied in the affirmative. Dr. Spaulding, the attending physician, testified that the physical and mental condition of Mrs. Van Wazer at that time was such that he doubted "if she could understand the purpose" of such an affidavit.

The affidavit thus executed was delivered by Mrs. Getzman the same day to the recording secretary above mentioned, who, after submitting it to a meeting of the court held the same afternoon, mailed it to the officers of the high court. The latter received it on the morning of February 11, and on February 13, (after the death of

the following are the most important points to be considered in the study of the history of the United States. The first is the discovery of the continent by Christopher Columbus in 1492. This event marked the beginning of the European colonization of the Americas. The second is the establishment of the first permanent English colony in Jamestown, Virginia, in 1607. This colony was the first of many that would be founded along the eastern coast of the United States. The third is the signing of the Declaration of Independence in 1776, which declared the United States to be a sovereign nation. The fourth is the signing of the Constitution in 1787, which established the framework for the federal government. The fifth is the signing of the Emancipation Proclamation in 1863, which declared that all slaves in the United States were to be freed. The sixth is the signing of the Civil Rights Act in 1964, which prohibited discrimination on the basis of race, color, religion, sex, or national origin. The seventh is the signing of the Voting Rights Act in 1965, which prohibited discrimination on the basis of race in voting. The eighth is the signing of the Environmental Protection Act in 1970, which established the Environmental Protection Agency. The ninth is the signing of the Affordable Care Act in 2010, which established the Patient Protection and Affordable Care Act. The tenth is the signing of the Marriage Equality Act in 2015, which established the right of same-sex couples to marry.

The following are the most important points to be considered in the study of the history of the United States. The first is the discovery of the continent by Christopher Columbus in 1492. This event marked the beginning of the European colonization of the Americas. The second is the establishment of the first permanent English colony in Jamestown, Virginia, in 1607. This colony was the first of many that would be founded along the eastern coast of the United States. The third is the signing of the Declaration of Independence in 1776, which declared the United States to be a sovereign nation. The fourth is the signing of the Constitution in 1787, which established the framework for the federal government. The fifth is the signing of the Emancipation Proclamation in 1863, which declared that all slaves in the United States were to be freed. The sixth is the signing of the Civil Rights Act in 1964, which prohibited discrimination on the basis of race, color, religion, sex, or national origin. The seventh is the signing of the Voting Rights Act in 1965, which prohibited discrimination on the basis of race in voting. The eighth is the signing of the Environmental Protection Act in 1970, which established the Environmental Protection Agency. The ninth is the signing of the Affordable Care Act in 2010, which established the Patient Protection and Affordable Care Act. The tenth is the signing of the Marriage Equality Act in 2015, which established the right of same-sex couples to marry.

the insured) a new certificate payable to Mrs. Getzman was issued, which was not delivered to her until several days later. The only dues or assessments ever paid by Mrs. Getzman were dues, amounting to \$3.15, which accrued about a week before the death of the insured. When they were paid does not appear. Mrs. Hill was ill at her home at that time, and at no time during the last illness of the deceased did Mrs. Getzman or Peter Van Wazer communicate the fact of their mother's illness to Mrs. Hill, and Mrs. Hill had no knowledge of that fact, or of the fact that any change had been made in the certificate, until after her mother's death. ✓

All the testimony was heard in open court, and from a reading of the record, it seems that the chancellor was of the opinion that the only real question in the case, as it was presented to him, was whether Mrs. Van Wazer was of sound mind and memory at the time she signed the affidavit above mentioned. In our opinion that question is not of controlling importance under the facts of this case. If it be conceded that Mrs. Van Wazer was fully capable of doing what she did, and fully understood the consequences of her acts, the fact nevertheless remains that the certificate issued to Mrs. Getzman was obtained, without the knowledge of Mrs. Hill, by the use of a false affidavit, known to be such at the time both by the insured and by Mrs. Getzman. This was a fraud upon Mrs. Hill if, at that time, she was the equitable owner of the certificate then in her possession, or had any right therein or thereto which can be enforced in a court of equity. While it has often been stated, as a general rule, that the beneficiary named in an insurance certificate like the one here in question has no such vested interest therein as will ordinarily prevent the insured from surrendering the certificate and naming a new beneficiary at any time, where no intervening rights have attached, yet it has been held repeatedly in this state that if the insured has once designated an eligible beneficiary and caused a certificate to be issued payable

to such beneficiary, and the beneficiary so named has advanced money or paid dues and assessments upon the faith of such certificate and in pursuance of an agreement to that effect with the insured, the beneficiary so named acquires a beneficial interest in the certificate which may be enforced in a court of equity, and any subsequent ^{change of} the certificate, without the knowledge of the beneficiary, is fraudulent and will not be permitted in a court of equity to defeat the rights of the beneficiary named in the original certificate. (Royal Arcanum v. Tracy, 169 Ill. 123; McGrew v. McGrew, 120 Ill. 304; Royal Arcanum v. McKnight, 238 Ill. 349; Conner v. Conner, 145 Ill. App. 308.)

In our opinion, this exception to the general rule is clearly applicable to the facts of this case. A proceeding of this character is a suit in equity, in which equitable as well as legal rights will be recognized and protected. After the agreement was made in April, 1910, between the insured and Mrs. Hill, the delivery of the certificate to the latter by the insured, and the payment of dues and assessments thereon by Mrs. Hill according to her agreement, the insured had no right, as between herself and Mrs. Hill, to surrender the certificate and have a new one issued payable to another person, and her attempt to do so, based upon a false affidavit, was a fraud upon Mrs. Hill, and was also a fraud upon the association, if its officers were ignorant of the facts (Royal Arcanum v. Tracy, supra); and Mrs. Getzner, who knowingly participated in the fraud, cannot be permitted to profit thereby in a court of equity.

The trial court refused to permit Mrs. Hill to testify regarding the agreement made in April, 1910. We think this was error. The question at issue was: Who is equitably entitled to the fund that was brought into court by the association? Upon this issue while it is true that both Mrs. Hill and Mrs. Getzner must show that they are eligible beneficiaries under the constitution and

By-laws of the association, yet neither is suing or defending "as the executor, administrator, heir, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee," within the meaning of those terms, as used in section 2 of the chapter on Evidence and Depositions. The heirs and personal representatives of the deceased, as such, have no interest whatever in the fund in controversy, and therefore both Mrs. Weisman and Mrs. Hill were competent witnesses to testify in their own behalf as to any conversation with the deceased that is otherwise competent, relevant or material to the issues in the case. (Green v. Holmes, 93 Ill. App. 74.) The substance of the agreement, however, was shown by other evidence.

Other alleged errors are assigned and discussed by counsel, but none of them affects the controlling question above mentioned, and it will therefore not be necessary for us to consider the same.

For the reasons stated, the decree of the Superior court will be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.



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